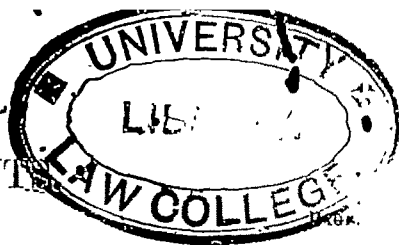
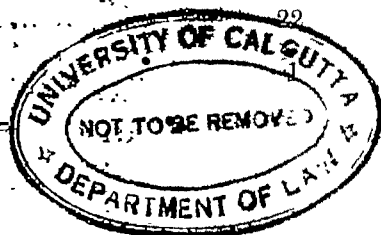


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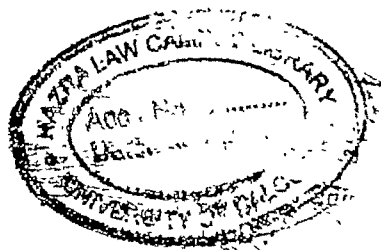
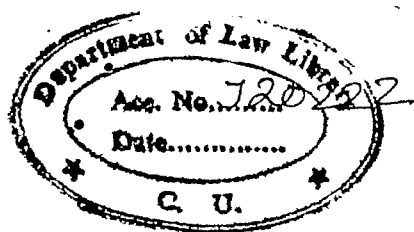
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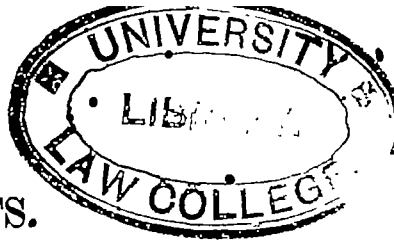
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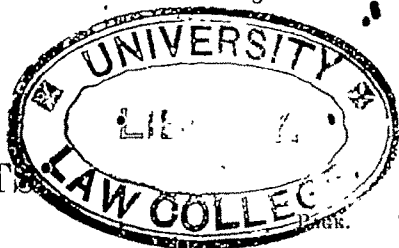
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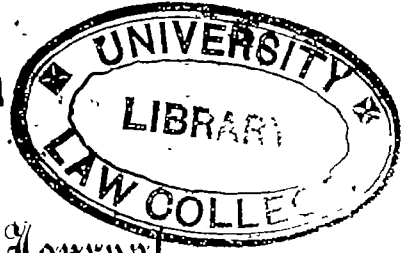
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PART I.]

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[VOL. XII.]

THE CIVIL PROCEDURE CODE BILL.

SINCE the passing of the Civil Procedure Code in 1882, there has been a growing multitude of decisions which have brought to light the defects in the various sections and the necessity for a thorough revision of the whole Code. This work has now been taken in hand by the Supreme Legislative Council, and a Bill has been accordingly introduced to consolidate and amend the law relating to Civil Procedure. While there is no subject which appears more technical to the layman than the law of Civil Procedure, there is at the same time none which has a more intimate bearing upon the efficient administration of justice. Besides requiring a thorough knowledge of law, and a high degree of skill in drafting, the task of codification requires an accurate knowledge of the practical inconveniences and difficulties experienced in the working of the existing law. The work would be best done when entrusted to a small committee composed of eminent judges, lawyers, and draftsmen. We have often had occasion to remark upon the want of suitable machinery in the Supreme Legislative Council for introducing or carrying out any measure of codification in a scientific or satisfactory manner. The Bill now before the public affords fresh illustration of the shortcomings of the Legislature in this respect. The revision of the Code has been carried out in a very crude and unscientific manner, and while it betrays slovenliness and negligence of drafting in many places, no serious attempt has been made to make the different provisions harmonise and fit in with each other or to render them clear and precise. The object of the framer of the Bill appears to be rather to promote

expedition and cheapness than the administration of sound justice. The rendering of complete justice being assumed to be impracticable, cheapness and quickness are apparently regarded as the main desiderata of the law of Procedure. We must enter a strong protest both against the assumption and against the conclusion. Because the longer purse may have an advantage in a litigation and because it may not be always possible to cope with the arts of evasion and delay, it does not follow that the Legislature should, in the conviction of its impotence, regard cheapness as the main object of the law, or that it should refrain from making any serious attempt to mould the law of Procedure so as to secure as complete justice as possible between the litigant parties. The objects which have thus weighed with the Legislature have led to a number of radical changes fraught with very grave consequences to suitors. Among other provisions, we may refer to those relating to second appeals and to the provisions for dispensing with a full record of the evidence even in appealable cases. The reasoning of the Law Member in support of these changes is as mischievous as it is fallacious. His argument is, that if the judges are competent, we can trust them, and if they are not competent, no rules can compel them to decide cases rightly. He forgets that there is a middle position, and that, while the judges may not be competent enough to discharge their functions without any supervision or control, they may be able to discharge their functions satisfactorily under the actual supervision or the fear of supervision of an appellate tribunal. Having regard to the very perfunctory and unsatisfactory way in which the Courts of Small Causes discharge their duties and to the vagaries of judges even in original suits, it would be most inexpedient to release them from the obligation of correctly and fully recording the evidence.

It may, with equal show of reason, be argued against the enactment of the Penal Code that, if men are honest and moral, no Penal Code is necessary, and if they are not honest and moral, no Penal Code can make them so. A similar conviction of the impotence of the Legislature is apparently at the basis of the proposal to restrict the right of second appeal. It was observed by Mr. Raleigh that it would be a profound mistake to assume that every wrong decision of a lower court can be set right in a court of appeal, and that many a questionable decision stands because the parties cannot afford

to go further. Neither of these reasons appear to us to be a ground for curtailing the right of second appeal. Because every decision of a lower court cannot be set right in a court of appeal, is that any reason for preventing the appellate court from setting right some wrong decisions at least or as many wrong decisions as possible? Because in some cases a party is too poor to take his case to an appellate court and obtain the reversal of a questionable decision, is that any reason for the denial of justice even to a party who can afford to go up on appeal? It is said again that, even when an appeal is preferred, the higher court can only deal with the case as it is presented and recorded in the court below; and that if the court below is not equal to its work, evidence has not been properly taken; if the decree is not framed so as to cover the points really in dispute, and the court of appeal is unable to do complete justice, and the case may be sent back or the appeal may be decided on technical grounds. We fail again to discover in these arguments any ground for introducing a restriction on the right of second appeal. If the case has not been properly presented and recorded in the court below, owing to the fault of the party, the appellate Court cannot be blamed if it is unable to do justice. If, on the other hand, it is due to the fault of the court below that the proper evidence has not been taken or that the decree is not framed so as to cover the points really in dispute, it is the right and duty of the appellate Court to interfere and to rectify the error of the lower Court. Comparisons are in this connection instituted between the right of appeal in England and the right of appeal in this country. The conditions in the two countries are, however, so dissimilar that it is idle to institute any such comparison. The assumption that our subordinate judiciary is competent enough to be left alone without any fear of check or control by an appellate tribunal is, in our opinion, altogether unwarranted.

We shall now notice some of the more important changes introduced by the new Bill. The first amendment that strikes the eye is the formidable definition of a decree. A decree is said to include a large number of miscellaneous orders and not to include a nearly equally large number of other orders. There are 19 kinds of orders specified as included in a decree. The result of this would be that in most of the appeals against such orders which

have the force of decrees, an *ad valorem* Court fee would have to be paid upon the subject-matter in dispute. An order refusing leave to sue under clause 12 of the Letters Patent of the High Court, is said to be included within the definition of a decree, evidently with the object of conferring a right of appeal in respect of such orders. The right of appeal is regulated by clause 15 of the Letters Patent, which declares that an appeal shall lie from the judgment of a single Judge of a High Court. The proper mode of declaring that an order refusing leave to sue is appealable would be by providing that it falls within the definition of the word "judgment" as used in the Letters Patent. The provision, however, is altogether out of place in the Code of Civil Procedure, which does not regulate appeals from the judgment of a single judge of the High Court to other judges of the same Court. Coming to section 11, which lays down that all suits and proceedings of a civil nature are cognisable by the Civil Courts, one might have expected some illustrations of the class of suits and proceedings of a civil nature and those which are not of a civil nature. But the section is discreetly silent upon the point.

The section relating to *Res-judicata* has been made extremely cumbrous, and we doubt whether the rules laid down are likely to be more intelligible or clear than the rules in the present Code. The subject of *Res-judicata* is a very intricate and difficult one, and there is no sign of any attempt to grasp the principles underlying the doctrine and state them with clearness. One of the most troublesome portions of section 13 in the existing code is Explanation II. "Any matter which might and ought to have been made ground of defence or attack in the former suit, is to be deemed to have been a matter directly and substantially in issue in such suit." The substantive part of the existing section lays down that the doctrine does not apply, unless the matter "substantially and directly in issue" in the previous suit has been heard and finally decided by the former court. While Explanation II merely lays down that the matter referred to shall be deemed to have been "directly and substantially in issue in the former suit", it does not lay down that it should be also deemed to have been heard and finally decided by the court which decided that suit. This incongruity is repeated in the present Bill also. It is said that one of the conditions of *Res-judicata* is that the judgment, or order, should have

adjudicated upon the merits of a matter "directly and substantially in issue", though such matter was omitted to be alleged if it formed a necessary ground of attack or defence. If the matter was omitted to be alleged, we fail to see how it can be said to have been adjudicated upon directly and substantially. Another condition for the application of the doctrine is stated in clause (d). "If the judgment, order or decree, was passed by a court of *exclusive or concurrent* jurisdiction, and where the jurisdiction is concurrent, the court making the judgment, order or decree, would, as regards valuation and nature of the claim, have been competent to adjudicate upon the subsequent suit or other proceeding." In the case of a judgment passed by a court of exclusive jurisdiction, the provision that the Court should have been competent to adjudicate upon the subsequent suit is dispensed with. Suppose, for instance, A brings a suit in the Small Cause Court for a sum of Rs. 200 due for interest upon a bond for Rs. 10,000, before the principal amount has become due, the Small Cause Court would be the proper court and a court of exclusive jurisdiction. If the Small Cause Court should decide in this suit for the interest that the bond was a forgery, this finding would preclude a regular court from trying the question of the genuineness of the bond in a suit for the recovery of the principal sum due, as the condition that the court which tries the former suit should be competent to entertain the subsequent suit is not laid down with reference to courts of exclusive jurisdiction. Again with regard to a court of concurrent jurisdiction, it seems to be superfluous to provide that it should be competent to adjudicate upon the subsequent suit whether as regards the valuation or the nature of the claim. Such competency is implied in the statement that it is a court of concurrent jurisdiction.

Coming to the chapter dealing with parties, we find that some of the rules of the Judicature Act have been adopted, though without much discrimination. The rule that "all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of, or arising out of the same transaction or a series of transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or of fact would arise" is a reproduction of the English rule as amended after the decision in *Smurthwaite v. Hannay* (1894,

A. C., pp. 494). The rule is a decided improvement upon the old section, but we must regret that some of the other rules as to parties have also not been adopted. For instance, rules 5 and 7 of Order 16. Rule 5 declares that "it shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him, but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest. Rule 7 lays down that where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may in such manner as hereinafter mentioned or as may be prescribed by any special order, join 2 or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent may be determined as between all parties." Having regard to the language of section 28, corresponding to Rule 4 of Order 16, which lays down that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, it would have been logical and consistent to have adopted also Rules 5 and 7 of the same order to which we have referred. Sections 26 and 28 of the Draft Bill clearly permit the joinder of several causes of action in the same suit by different plaintiffs against the same defendant or by the same plaintiff against different defendants. The sections relating to misjoinder of causes of action have, therefore, to be modified so as to fit in with sections 26 and 28. We find, however, in section 31, clause 3, that nothing in this section shall be deemed to enable two or more plaintiffs to join in one suit in respect of distinct causes of action. Illustration (b) of section 26 is a clear case of plaintiffs having distinct causes of action joining in one suit. The provision in clause 3 of section 31, that when two or more plaintiffs base their claims to relief upon a common ground, the mere fact that the several properties in respect of which relief is claimed belonging to several plaintiffs shall not be deemed to render the several claims distinct causes of action, is an illustration of the clumsiness of drafting and shews the unsuitability of retaining the general prohibition of misjoinder of causes of action. Section 45 also requires modification in view of the observations just made. Sec-

tion 44 has undergone no improvement in language. The words "no cause of action should be joined with a suit for the recovery of immoveable property," are not happy. One speaks of combining two causes of action and not of combining a cause of action with a suit. What the section intended to express is that a different cause of action should not be joined with one for the recovery of immoveable property.

(To be continued).

NOTES OF INDIAN CASES.

Yamuna Bai Rani Sahiba v. Solia Gounden. I. L. R., 24 M. 339:—Under S. 78 of the Madras Rent Recovery Act, a suit was brought by a tenant to recover goods illegally attached by the landlord and detained for more than six months and damages were also claimed for the illegal detention. The suit was instituted more than six months from the date of the attachment, but within six months from the date on which the attachment was declared illegal by the Revenue Court. The period of limitation being six months from the date of the cause of action, the question to be considered was when the cause of action arose, whether on the date of the original seizure or subsequently. It was held by the High Court that the detention was a continuing wrong and that the suit was not, therefore, barred by the six months' rule. The decision appears to us to be open to question. The illegal distraint is really the cause of action and the detention of the property is only an aggravation of the wrong. See *Bhagirata Panda v. Pandala Gopaludu*, I. L. R., 3. M. 121, and *Clark and Lindsell on Torts*, 2nd Edn. 215.

Sonaram Das v. Mahiram Das. I. L. R., 28 C. 235.—A suit by the purchaser of property in execution sale for the recovery of the money on the ground that the judgment debtor had no saleable interest, appears to us to be one of a small cause nature. If he specifically prays for the sale being set aside, such a prayer might bring the suit within clause 21 of the 2nd Schedule. We fail to see the supposed distinction between the case reported in *Prasanna Kumar Khan v. Uma Charan Hazra*, 1 C.W.N. 141, and the case under

notice. The setting aside of the sale is not a condition precedent to the recovering of the money. All that the Court has to find is that the judgment-debtor had no interest, and that, therefore, nothing passed by the sale. The judgment-debtor having an interest in part of the property sold cannot affect the question.

Khanker Abdur Rahman v. Ali Hafiz. I. L. R., 28 C. 256 :—

It is difficult to follow the learned judges in the decision of this case. The authority of the Privy Council in *Balkishan Das v. Legge*, 27 I. A., p. 58, on the construction of S. 92 of the Evidence Act is clear. It has always seemed to us that in endeavouring to do justice between man and man, the Courts have often contravened the provisions of S. 92 of the Evidence Act. If no evidence other than a writing can be adduced to convert a sale into a mortgage, how is the conduct of the parties, repayment of the money etc., to be admitted as evidence of an agreement at variance with the deed of sale? One distinction, however, might have been made by the learned judges which does not appear to have been alluded to. The attempt in this case was to show that a sale was a conditional sale. It is competent within S. 92 to prove a condition not specified in the writing. It might therefore be competent to the parties to show that the sale was to operate on failure to pay a certain sum of money within a certain time. But it is another question when evidence is tendered to show that the apparent sale was only a mortgage. We are in entire accord with the judgment of *Benson and Bhashyam Aiyangar, JJ.*, in *Achutarama Razu v. Subba Razu*, I. L. R., 25 M. 7.

Mahomad Ali Hossein v. Nazar Ali. I. L. R., 28 C. 289 :—

We think there is some confusion in the language of the *Chief Justice* in this case. Section 3 of the Law Reports, Act XVIII of 1875, is not correctly quoted by the learned *Chief Justice*. The section not merely says that the court is not bound to hear a case cited, but also adds that no court shall receive or treat as an authority binding on it the report of any case, etc. The section only deals with reports of judgments but not with certified copies of judgments. The language is clear as regards reports that no report shall be treated as a binding authority other than the authorised report. This, of course, does not mean that the court shall not look at any other report for instruction. But the authority of certified copies of

judgments is left unimpaired. In *Ambalavana Pandaram v. Vaguran*, I. L. R., 19 M. 52, the High Court of Madras fell into the same mistake as the Calcutta High Court in *Makbul Ahmed v. Rakhal Das Hazra*, 4 C. W. N. 732.

SUMMARY OF RECENT CASES.

Contract—Remoteness—Uncertainty—Statute—First refusal—Pre-emption—Interest in land—Purchaser with notice—Injunction.

• *Manchester Ship Canal Co. v. Manchester Racecourse Co.,*

[1901], 2 Ch. 37. C. A.

The right to *first refusal* is the right to purchase property at a fair and reasonable price or at a price which any other intending purchaser is prepared to offer. This right of pre-emption cannot be defeated by offering the property for sale to the pre-emptor at an extravagant price which nobody offers to pay for it, and the owner himself does not expect to be paid by anybody.

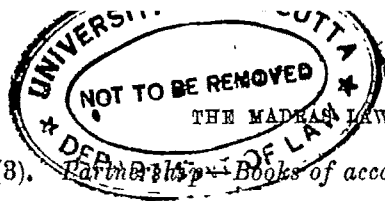
The contract to give the first refusal does not create an interest in land; but where in contravention of the contract, the owner agrees to sell the land to a third person who has knowledge of the contract, an action may be maintained against them for a declaration of the plaintiff's right of pre-emption and for an injunction to restrain them from carrying out the contract. See *Lumley v. Wagner*, 1 D. M. and G. 604.

An objection that the contract was void for remoteness or uncertainty was overruled on the ground that the contract had been confirmed by a private Act of Parliament to which it was scheduled.

(2). *Administrator—Right of retainer—Administration decree—Administration bond—"Not unduly preferring."*

In re Belham—Richardes v. Yates, [1901], 2 Ch. 52 C. A.

The ordinary administration bond of an administrator by which he undertakes not to *unduly* prefer his own debt does not put an end to his right to retain for his own debt. That preference over other debts of equal degree is given to him by law and is not *undue* preference of his own debt.



(8). *Partnership—Books of account—Inspection by agent.*

Bevan v. Webb [1901] 2 Ch. 59 C. A.

The right of a partner to examine books of account kept by managing partners and to copy or take extracts from any of the books may be exercised by means of an agent; where the agent so appointed to inspect is not an improper person and undertakes not to make any use of the information he obtains except for the purpose of advising his principal, the managing partners cannot object to give inspection. Decision of *Joyce, J.* reversed and *Brown v. Perkins*, 2 Hare 540 and *Dadswell v. Jacobs*, 34 Ch. D. 278 relied on.

Will—Bequest to association—Charity—Perpetuity.

In re Clarke—Clarke, v. Clarke, [1901], 2 Ch. 110.

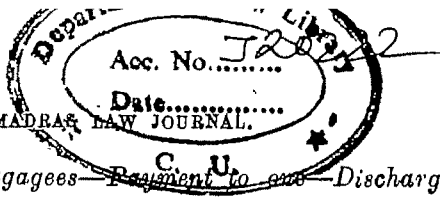
A gift to charity is never bad as offending against the doctrine of perpetuities.

A gift in perpetuity is bad if it is not for charity. But a gift to a perpetual institution is not necessarily a gift in perpetuity. If the gift can be construed to be in favour of the individual members of the association or if the legacy when paid could be freely spent by the existing members of the institution, there is no contravention of the rule of perpetuities, and the gift is good. But if the gift is one which vests it in all or some of the existing members in trust for the benefit of the perpetual institution, it tends to a perpetuity and is bad. (Authorities on the point elaborately discussed).

Vendor and purchaser—Bankruptcy—Specific performance—Trustee—Disclaimer.

Pearce v. Bastable's Trustee In Bankruptcy, [1901], 2 Ch. 122.

Specific performance of a contract to sell leasehold property may be enforced against the trustee in bankruptcy of the vendor; and the trustee cannot disclaim the contract without disclaiming the lease.



Mortgage—Joint mortgagees—Payment to one—Discharge—Partner—Payment to firm.

Powell v. Broadhurst, [1901], 2 Ch. 160.

Payment to one of two joint mortgagees discharges the mortgage at law. But in equity, the security is discharged only to the extent of the payee's interest in it. The fact that the payee afterwards became the survivor and might then have granted a valid discharge both at law and in equity does not affect the rule. What was only a partial discharge in equity at the time of payment does not have the effect of a full discharge by reason that the person who received the payment became afterwards capable of granting a full discharge if the payment had then been made to him.

A debt owed to a partner in a firm in his individual capacity cannot be validly paid to the firm unless the firm has been authorised to receive it.

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7. *Easement—Way—Prescription—Annual payment—License—Agreement—Evidence—Enjoyment as of right.*

Gardner v. Hodgson's Kingston Brewery Company,

[1901], 2 Ch. 198, C. A.

For upwards of sixty years the plaintiff was using a right of way over the defendant's land and for nearly forty years an annual payment of 15 s. was being made by the plaintiff to the defendant. There was no evidence as to how the use originated; nor was there any evidence for what purpose the payment was made. The plaintiff alleged that the payment was for the repair of the way while the defendant pleaded that it was for the use of the way.

Vaughan Williams and Romer, L., J.J. held that the proper inference from the annual payment was that the user was permissive and not as of right and that no indefeasible right had been acquired by the enjoyment for forty years.

On the other hand *Rigby*, L. J., held that the inference did not necessarily follow from the facts, that no agreement, permitting the user for rent within forty years having been proved, an indefeasible right must be deemed to have been acquired; and the same result, it seems, would have followed even if there had been proof of any agreement before the 40 years.

8. *Trustees—Breach of Trust—Appropriation—Knowledge of co-trustees or cestui que trust—Mortgage—Leaseholds—Priority—Legal estate—Getting in legal estate after notice of prior claim—Relation back—Notice through Solicitor.*

Taylor v. L. & C. B. Co.—L. & C. B. Co. v. Nixon,

[1901], 2 Ch. 231 C. A.

Where a trustee who has misappropriated the trust fund secretly appropriates a mortgage of his own to cover the loss to the trust, the appropriation is valid and binding though neither the co-trustee nor the beneficiaries had any knowledge of the misappropriation or the subsequent appropriation. See *Sharp v. Jackson* [1899], A. C. 419.

The equitable title arising from such appropriation must give way before the claims of a third person who gets the legal title to the mortgage for value without notice of the prior equity.

Where one who has an equitable title subsequently gets in the legal title but before he so got it in had notice that the legal title was held in trust in favour of others who assert a title to it, the legal title does not give him any priority.

Where a person who was trustee for two estates, first appropriated a mortgage of his own to cover his fraud upon one trust and afterwards conveyed it to the other trust in the joint names of himself and another co-trustee, it was held that the rights of the latter estate could not be affected by the notice of the prior appropriation to the fraudulent trustee, because (1) an independent solicitor acting for the latter could not have discovered the appropriation, and (2) the notice to the fraudulent trustee was not in his capacity as solicitor to that estate or in the same transaction in respect to which the question of notice arose.

A mortgage of land though a chose in action must, for the purpose of determining priorities, be treated as real property and so should leaseholds also be treated.

A prior incumbrancer will be postponed to a later one if the former negligently allowed the title deeds to remain in possession of the owner and so misled another person into advancing moneys on the security of the title deeds. But where the mortgagor was in possession of the deeds as trustee or solicitor, there is no negli-

gence in allowing him to be in possession, and the mortgagee will not be postponed by the fraudulent acts of the trustee at any rate so long as he had no reason to suspect any want of good faith on the part of the mortgagee.

Contract—Restraint of trade—Agreement limiting the price of resale.

Elliman, Sons and Co. v. Carrington and Sons,
 Ld., [1901], 2 Ch. 275.

The plaintiffs, manufacturers, sold goods to the defendants wholesale dealers and imposed upon them the condition that they should not sell goods below a specified price and that if they sold them to retail dealers, they should impose the same condition upon the retail dealers. It was held that this contract was not in restraint of trade and could be enforced. An action was therefore held to lie when the defendants sold goods to retail dealers without taking any such agreement as was provided by the contract.

*Company—Shares—Certificate—Deposit as security—
 Foreclosure.*

Harrold v. Plenty, [1901], 2 Ch. 314.

Where the certificate of shares is deposited with a person to secure a debt and interest, the creditor may bring an action for foreclosure and transfer of shares in his name.

Vendor and Purchaser—Contract—Window—Easement—Representation—Non-disclosure—Specific performance—Compensation—Costs.

Greenhalgh v. Brindle, [1901], 2 Ch. 324.

The existence of a window in a house agreed to be sold does not give rise to an implied representation that there is an easement of light over the adjoining land or that the statutory period of prescription for an easement is running; the non-disclosure of the fact that the vendor had no manner of easement but had only a permissive enjoyment of the window is no reason to refuse specific performance or to grant the purchaser compensation. The Court, however, refused to give the vendor costs of the action.

Administration—Bank—Manager—Grant of letters of Administration to manage—Right to retain debt due to bank.

In re Richards—Lawson v. Harvey, [1901], 2 Ch. 399.

The manager of a bank was appointed administrator cannot retain a debt due from the estate to the bank, though he was described in the letters of administration as manager of the bank. The grant was to him as an individual and his position as administrator would not be affected, if he lost his position of manager in the bank.

JOTTINGS AND CUTTINGS.

The Youthful Offenders Act, which extends the lenient treatment of juvenile criminals, introduces a new element into parental responsibility. If youths under the age of sixteen are charged with offences for which a court of summary jurisdiction may impose 'a fine, damage, or costs,' their parents or guardians, if there is reason to believe that they have conduced to the commission of the alleged offences by wilful default or habitual neglect of their responsibilities, may be summoned with them, and ordered to pay 'the fine, damages, or costs,' and may also be required to give security for the good behaviour of their offspring or charges. This is not the only notable change which the Act introduces into the administration of the Criminal Law. The Court, instead of sending a youthful offender to prison, may commit him into the custody of 'any fit person' who is willing to receive him, 'due regard being had, where practicable, to the religious persuasion of the child.' Who are the fit persons who are willing to accept the custody of young criminals and what are the steps being taken towards their discovery, are questions which must remain unanswered for the present.—*The Law Journal*.

Prohibition of Sale of Intoxicating Liquors to children.—Another instance of the increasing regard of the Legislature for the interests of children is to be found in the *Intoxicating Liquors (Sale to Children) Act*. It prohibits the sale of any description of intoxicating liquor to children under the age of fourteen,

'excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint.' Any holder of a license who knowingly serves such a child is liable to a penalty of 40s. for the first offence, and of £ 5 for any subsequent offence, and any person who knowingly sends such a child for intoxicating liquor in the prohibited form is liable to the same penalties. The two other Acts which come into force on New Year's day are the Patents Act, 1901, which amends the law with reference to international arrangements for patents, and the Educational (Scotland) Act, 1901, which regulates the employments and attendance of children at school north of the Tweed.—*Ibid.* •

• * *

The Lord Chief Justice.—On December 22, 1842, the Lord Chief Justice first saw light at Swinshead Abbey in the county of Lincoln. On Sunday, therefore, he entered his sixtieth year. Considering the phenomenal rapidity of his success at the Bar (says the *Daily Telegraph*.) Lord Alverstone had a long and weary time of waiting for what used to be called the 'pillow of the Attorney-General.' No law officer of modern times has served so patient an apprenticeship. It is sometimes stated that he took 'silk' at an earlier age than any who had gone before him; but that is not so. Young he certainly was—not quite thirty-six—but Farrer Herschell, the future Lord Chancellor, was in the front row when he was thirty-five. Mr. R. B. Haldam, K. C., has done better in this respect than either. He received the honor of a silk gown in 1890 when he was a child of thirty-four. An examination of historical records shows that a part from 'Jock' Campbell and Lord Russell of Killowwe, Lord Alverstone has begun his judicial career later than any of his immediate predecessors. Lord Denman was born in 1779, and was, therefore, fifty-three when he became Chief Justice in 1832. Lord Campbell, who was born in the same year, succeeded Lord Denman in 1856, being then seventy-one. Nine years had passed since, as the 'six weeks' Lord Chancellor of Ireland, he had been concerned with the administration of the law. Sir Alexander Cockburn was appointed Chief Justice of the Common Pleas in 1856, when he was fifty-four. Sir William Bovill filled the same office in 1866, being then fifty-two; and Lord Coleridge was fifty-two when he

succeeded Sir William Bovill in 1873. Lord Russell of Killowen was sixty-two when, on the death of Lord Coleridge, he became Chief Justice.—*Ibid.*

Contracts—Consideration—Forbearance of a bonâ fide claim—Held, that forbearance to prosecute a claim honestly made but not legally valid is no consideration for a promise. *Price v. First Nat. Bank*, 64 Pac. Rep., 639 (Kan.).

The rule here followed was repudiated in England by the case of *Callisher v. Bischoffsheim*, L. R. 5 Q. B., 449 (1870). In America some jurisdictions support the doctrine of the principal case. *Bates v. Sandy*, 27 Ill. App. 552. Yet the weight of authority inclines toward the English rule. *Prout v. Pittsfield Fire Dist.*, 154 Mass., 450. It would seem that detriment to the promisee is the scientific test of consideration. See LANG., SUM. CONT. 45 *et seq.* But there are two theories as to the application of this test. One holds that detriment includes any act or forbearance given in exchange for a promise. See 12 HARV. LAW REV., 515 *et seq.* Under this view the principal case is clearly unsound. But the prevailing opinion seems to be that the act or forbearance must be one not required by previous legal obligation. See 8 HARV. LAW REV., 27 *et seq.* Regarding consideration from the stand-point of the parties at the time of the agreement, as the law seems properly to do, the second theory will not support the principal case; for one honestly believing his claim to be valid has a legal right to litigate it, and in forbearing, does what he was not legally bound to do. See, however, LANG., SUM. CONT. 56, 57. The principal case is further open to the practical objection that it discourages compromise.—*Harvard Law Review*.

Equity—Specific Performance—Entire Contract for the Sale of Realty and Personality—Held, that a single contract for the sale of a plantation together with the stock, implements and supplies thereon may be specifically enforced as an entirety. *Brown v. Smith*, 109 Fed. Rep. 26 (Cir. Ct. S. C.).

It is well settled that ordinarily a contract for the transfer of a chattel will be specifically enforced only where the chattel to be transferred has some unique, sentimental, or artistic value. *Dowling v. Bétjemann*, 2 Johns. and Hem. 544. It is equally well settled, however, as a general principle, that where the plaintiff is entitled

to equitable relief and also to legal relief, equity on taking jurisdiction will, to avoid multiplicity of suits, do complete justice, although in doing so it may decree on matters otherwise cognizable only at law. See POM., EQ. JUR. § 181. The contract in the principal case being in part for the conveyance of land, it seems proper for equity to take jurisdiction; and if so it is strictly in accord with equitable principles that specific performance be decreed as to the chattles, in a suit on the whole contract, and that the plaintiff be not forced to use at law for damages in respect to them. Authority on the point is very meagre; but the cases found apply the same rule as the principal case. *Leach v. Forbes*, 77 Mass. 506, 510; *Perin Megibben*, 53 Fed. Rep. 86, 91.—*Harvard Law Review*.

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Obiter dictum.—The vision of a Final Court of Appeal for the United Kingdom and the Colonies, to be a 'golden link of Empire,' has for the time being faded away from the horizon of practical politics, but the negotiations of the Conference summoned for that purpose have not been unfruitful, inasmuch as they have led to a substantial measure of agreement on the subject among the representatives. Put briefly, the measure of agreement on the subject comes to this: (1) That appointments to the new Judicial Committee should be made from time to time from the Dominion of Canada and Newfoundland, the Commonwealth of Australia, New Zealand, South Africa, the Crown Colonies and India. (2) That a member so appointed should vacate any judicial office which he may be holding. (3) That the selection of such members should not be restricted to judges and ex-judges. (4) That every member should be appointed for life or fifteen years. (5) That a suitable salary should be paid. (6) That a larger attendance of Lords of Appeal should be secured at the sittings of the Judicial Committee. These recommendations, assented to by all the representatives—with some qualifications by Mr. Justice Hodges of Australia, and Sir James Prendergast of New Zealand—constitute a body of important reforms which, carried out, will give new strength and dignity to the Judicial Committee, and prepare the way for the ideal scheme of an Imperial Court of Appeal for the Empire. The inclusion of representatives from the Crown Colonies is a counsel both wise and just. In the Crown Colonies are to be found some of the ablest of living lawyers—men qualified more than other judges by their experience of various systems of law to assist the deliberations of

the Judicial Committee. But the cardinal point in the recommendations is the appointee vacating any judicial office he holds. In making Sir Samuel Strong, Sir Henry deVilliers and Sir Samuel Way Privy Councillors, Lord Rosebury paid a graceful tribute to the Colonies, but, with their judicial duties to attend to in Canada, Cape Colony and Australia respectively, it was impossible that they should render aid to the sittings of the Judicial Committee at Whitehall. The proposed change, of course, involves payment. A Colonial Judge who vacates his office to sit with the Judicial Committee here must be provided with a suitable salary, but there ought to be no difficulty about this. There is a good deal in the last recommendation. In a multitude of councillors there is wisdom; besides which, they impress the imagination not a little, as we know in case of the full court for Crown Cases Reserved—*The Law Journal*.

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Legal-aid-Society.—The President of the American Republic, Mr. Theodore Roosevelt, in an article on 'Reform through Social work' in the *Fortnightly Review* (Nov. 1901), says:—

"A peculiar and exceedingly desirable form of work, originally purely charitable, although not now exclusively so, is that of the *Legal-aid-Society* founded by Arthur Von Brissin, in New York. It was founded to remedy the colossal injustice which was so often encountered by the poorest and most ignorant immigrants; it has been extended to shield every class,—native and foreign. There are always among the poor and needy, thousands of helpless individuals who are preyed upon by sharpers of different degrees. If very poor, they may have no means of obtaining redress; and especially if they are foreigners ignorant of the language, they may also be absolutely ignorant as to what steps should be taken in order to right the wrong done to them. The injuries that are done may seem trivial; but they are not trivial to the sufferers, and the aggregate amount of misery caused is enormous. The *Legal-aid-Society* has made it its business to take up these cases and secure justice. Every conceivable variety of case is attended to. The woman who has been deserted or maltreated by her husband; the poor sewing maid who has been mulcted out of her wages; the ignorant immigrant who has fallen a victim to some sharper, the man of no

knowledge of our language or laws, who has been arrested for doing something which he supposed was entirely proper; all these and countless others like them apply for relief and have it granted in tens of thousands of cases every year. It should be remembered that the good done is not merely to the sufferers themselves, it is also a good done to society, for it leaves in the mind of the new comer to our shores not the rankling memory of wrong and injustice, but the feeling that, after all, here in the New World, where he has come to seek his fortune, there are disinterested men who endeavour to see that the right prevails.

Subscriptions of Charitable Organizations.—Theory and decision are unfortunately in irreconcilable conflict in the majority of instances where charitable subscriptions have been enforced. In a late case a subscription for the purchase of a church site is held binding, on the ground that the consideration for the defendant's promise is to be found in the meritorious object of the subscription and in the mutual promises of the subscribers. *First Church v. Pungs*, 86 N. W. Rep. 235 (Mich). Although many authorities accord with this decision, it is impossible to agree with it unless it can be rested on other grounds than those stated. To support the subscriber's promise a consideration must move from the other contracting party,—in conventional phrase, the promisee must incur a detriment at the request of the promisor (12 *Harvard Law Review*, 151). Ordinarily the subscription paper contains, in express terms at least, neither a request by the subscriber nor a promise by the beneficiary. The subscription usually is a mere gratuity.—*In re Hudson*, 54 L. J. Ch. 811.

The American courts at first found this difficulty inseparable, but their desire to enforce promises so obviously binding in *foro conscientiae* led to the gradual adoption of various specious suggestions of consideration. See note, 16 *Am. Law. Reg. n. s.* 548. The modern law on the subject is in great confusion and encumbered with many inaccurate statements. It is often said, as in the principal case, that the mutual promises of the subscribers form the consideration. *Petty v. Trustees of Church*, 95 Ind., 278. Even if it be in fact true that the subscribers give their promises in exchange for each other, the beneficiary of the subscription, who is usually the

plaintiff, is not privy to the contract. *Cottage Street Church v. Kendall*, 121 Mass., 528. In states where a beneficiary is allowed to sue, however, a satisfactory result may be worked out on this doctrine if the facts admit of its application. Cf. *Irwin v. Lombard University*, 56 Oh. St., 920. But usually such a construction of the facts is false. It is also a fictitious consideration that is found in an implied counter-promise by the beneficiary, arising when the subscription is accepted or acted upon. *Maine Institute v. Haskell*, 73 Me., 140. A third view enforces the promise on the theory that the subscriber is equitably estopped from denying the consideration after the beneficiary has acted on the faith of it. *Beatty v. Western College*, 177 Ill., 280. This avoids the contractual difficulty only by substituting an infringement of the doctrine of estoppel. See 12 *Harvard Law Review*, 506. The most generally accepted theory considers the subscription an offer merely, which is made binding when expenses or liability has been incurred in reliance upon it. *Trustees of Church v. Garvey*, 53 Ill., 401. This necessitates an implied request by the promisor that such liability be incurred—an implication of fact, not usually justifiable. *Presbyterian Church v. Cooper*, 112 N. Y., 517. If a request can be inferred from the subscriber's promise, it would seem that entire performance and not merely a beginning of the contemplated undertaking would be requisite to complete the unilateral contract. Where there has been an express request however, there is of course no difficulty in enforcing the subscription after performance by the beneficiary. On this ground the principal case might possibly have been rested. Cf. *Barnes v. Perine*, 12 N. Y., 18.

Although on strict theory a charitable subscription can seldom be construed as a binding contract, it is eminently desirable in many cases that such subscriptions, although gratuities, should be enforced, as numerous worthy institutions are absolutely dependent upon them. Such enforcement, however, if it is to rest upon consistent and rational grounds must be obtained through suitable enactment by state legislatures, and not through judicial legislation, which violates the fundamental principles of contracts.—*Harvard Law Review*.

* * *

Legal Protection to Unborn Children.—By Lord Campbell's Act, where death has resulted from a wrong which would have entitled the injured party to sue had he lived, a cause of action is given to his administrator or next of kin. Under a similar statute

the death of a child caused by its premature birth for which the defendant was responsible was held to give no cause of action, as the child could not have sued if it had survived. *Gorman v. Budlog*, 49 Atl. Rep. 704 (R. I.). It is true that a child harmed before birth has been invariably denied redress by the courts, on the grounds that rights belong only to persons and that an unborn child is not a person. *Walker v. Great Northern Ry. Co.*, L.R. (Ir.) 28 Q. B. & Ex. Div. 69; *Allaire v. St. Luke's Hospital*, 184, Ill. 359. The plaintiffs seem never to dispute this reasoning, but they rely on that rule governing the distribution of property, that a child is to be considered born if it is for its benefit to be so considered. The decisions, however, must be taken to settle beyond pertinent discussion that to apply this rule as suggested is either to make the defendant a tort-feasor by a fiction, or substantially to change the convenient and fundamental rule that fixes birth as the precise point at which existence as a person begins. See 12 *Harvard Law Review*, 209. If then a child permanently crippled a moment before its birth by a careless *accoucheur* or even by an intentional wrong-doer is to have a remedy, it must be on some other ground.

One conceivable theory involves no sacrifice of legal principle. At the moment of birth the rule that an unborn child has no rights ceases to affect the case. If the child at birth acquires as a legal person a specific right to begin life with a sound body, violation of that right is a tort. To allow an action on the case would not be to declare that an unborn child is a person or has rights, but to ascribe to every born child a right of bodily integrity. The right so defined has never been judicially recognized. It is peculiar in being broken as soon as it comes into existence, and necessarily, some considerable time after the defendant's original fault was committed. Its peculiarities, however, are common to the right to means of support conceived by courts which give a posthumous child damages for the wrongful killing of its father. See *The George and Richard*, L. R. 3 A. & E. 466; *Cf. Quinlen v. Welch*, 66 Hun 584.

In view of the serious abuses which might result, the expediency of recognizing a legal right of the sort described is doubtful. On the difficult question of cause the mother may incline to roman-

ing and the jury to superstition. *Gorman v. Budlong*, *supra*, shown an additional danger like to be frequent. The child has died soon after birth. If it has suffered a tort an action by the next of kin, though perhaps not contemplated by the framers of Lord Campbell's Act, is strictly within its provisions; and substantial verdicts often undeserved may result. In many such cases recovery could be refused only on the ground that these abuses render it inexpedient to recognize at all the right of bodily integrity. Whether this ground should be taken, it is submitted, is the real question.—*Harvard Law Review*.

REVIEWS.

Privy Council Practice BY SAFFORD AND WHEELER, 1901, Published by Messrs. Sweet and Maxwell, Limited, 3 Chancery Lane, London. Price £ 50.

There is no court in the civilized world exercising a more extensive jurisdiction than the Judicial Committee of the Privy Council. The countries from which a final appeal can be carried to the Judicial Committee are vast and numerous and the people who have got this right of appeal are estimated to be a fourth of the population of the whole world. The conditions of appeal in these countries vary considerably and the rules of law and practice affecting the jurisdiction and procedure of the committee are to be found scattered in various statutes, orders in council, charters and orders made by the Judicial Committee. The compilation of these rules of procedure places before the practitioner in an easily accessible form all the information that he may require with reference to the procedure to be observed in the conduct of an appeal from the first stage to the last.

The plan adopted by the authors is very convenient. The first part gives all the imperial statutes and the orders in council of general application, and the forms and precedents for use in appeals together with a table of fees and costs as between party and party and solicitor and client. The second part deals with the enactments in force in the different possessions, laying down the procedure as to appeals, and the tabular statement at the beginning of the part shows in one glance a summary of the more important

conditions of appeal. The third part deals with the general practice before the Privy Council itself. The fourth part deals with practice in ecclesiastical appeals, and the fifth part deals with the jurisdiction of the Privy Council in patents and copyright. We have no doubt that the utility of the book will be greatly appreciated by all practitioners in this country who may have to send up appeals to the Privy Council.

Bailments. By WYATT PAINE, 1901. Published by Messrs. Sweet and Maxwell, 3 Chancery Lane, London.—Price 25s.

This is a very valuable treatise upon the Law of Bailments. It comprehends a large variety of topics, including the law of carriers by land and sea, pledge, hire purchase, bills of sale, deposit, goods in the custody of the law, the possessions of executors and trustees, the liens of artificers, auctioneers, bankers, warehouse men, unpaid vendors, etc. Notwithstanding the variety of subjects treated, the size of the book has been kept within moderate limits, and the author has added to the usefulness of the book by including an appendix dealing with the Australasian and the Indian law upon the subject. The book is as compact as it is complete and is bound to be useful.

A Treatise on the Law of Fraud and Mistake. By W.W. KERR. 3rd Edition, by Sydney E. Williams. Published by Messrs. Sweet and Maxwell, 3 Chancery Lane, London.—Price 25s.

Mr. Kerr's Treatise on the Law of Fraud and Mistake has long been the standard work upon the subject in England. No recommendation is necessary in the case of such a well-known work. The new edition supplies a long-felt want, and it has been prepared in a thoroughly satisfactory manner by its Editor, Mr. Williams.

The Law of Mortgage in India. By DR. RASH BEHARY GHOSE. 3rd Edition. Published by Messrs. Thacker, Spink and Co., Calcutta.

We hail with pleasure the appearance of the 3rd Edition of Dr. Rash Behary Ghose's excellent work on the Law of Mortgages in India. It is the only critical treatise upon the Law of Mortgages in this country, and a new Edition of it has long been a desideratum. The interval of 12 years that has passed since the date of the 2nd Edition has brought forth a multitude of decisions upon the

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Journal of the Society of Comparative Legislation, Dec. (1901.)			

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PART II.]

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HINDU AND MAHOMADAN RELIGIOUS ENDOWMENTS.

I. JURISDICTION OF BRITISH COURTS.

WE propose to discuss some of the questions relating to the law governing Hindu and Mahomadan religious endowments and foundations, their nature and origin. The statute law that we have to deal with is extremely meagre, and the decisions of the courts can hardly be said to have cleared up many of the difficulties and obscurities in which the whole subject is involved.

The first question that had to be faced by the courts of British India was whether they had jurisdiction to try suits relating to these endowments. Of course so long as the Company was only a commercial body, the question could not well arise. Even where native inhabitants dwelt in the factories built by the Company and the Company came to have courts of their own in the said factories exercising jurisdiction over Europeans and other persons resident in such factories, such a question was not likely to have arisen. For, the policy of the Company was, undoubtedly, not to create suspicion among the natives who were left to the enjoyment of their own laws and customs and were given their own courts to decide disputes among themselves. In fact, there was an implied, if not express, agreement when the natives came to live with the Europeans in the factories that they would be left in the undisturbed enjoyment of their rights and that their laws, &c., would be respected and given effect to.

The truth seems to be, as Mr. Cowell puts it (page 9, Cowell's History and Constitution of Courts in India), that during the period prior to and shortly after the battle of Plassey "wherever the English settled, except in the island of Bombay, which had been

ceded in full sovereignty to Charles II, the general character of their position was that it was obtained by leave of the *Native Government*. In Bengal especially, their settlements were founded, and their factories fortified with that leave, in districts purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent and even as officers exercising by delegation a part of the authority of the Native Government.

The ordinary consequence of this state of things would have been to render the English subject to the Native Government and amenable to its laws. They could not, however, be governed by the law of the Koran, and therefore from necessity they remained subject to their own law, and were obliged to take measures for introducing and administering it. Before the English assumed sovereign powers and independence of native authority, their position was extremely anomalous. Though their factories were part of the dominion of the Mogul, their own law was administered in them, and their own national character imparted to them as completely as if they were parts of English territory. A foreigner residing in them and carrying on trade was held to his national character not from the Mogul dominion to which they were subject, but from the British possessions.

Under these circumstances, it became necessary in very early days of the existence of the Company, that the Crown should grant to them certain legislative and judicial authority to be exercised in their East Indian possessions. That authority, however, it seems clear, was only intended to be exercised over their English servants, and such native settlers as placed themselves under their protection."

At page 11 of his book Cowell says "With regard to the grant of the judicial authority to be exercised, we might reasonably expect that it would be called for and required before the necessity arose for establishing any legislative authority. The actual decision of disputes in an infant society is of practical importance long before the necessity of a body of rules is felt. Moreover, the English were supposed to bring with them such of their own laws as were applicable to them in the circumstances in which they were placed. And factories established amongst races alien in

religion, habits and customs have always been deemed by the law of nations which has prevailed in Christendom to be so far exclusive possessions or privileged places, that all persons during their residence within them have been considered for most purpose to be clothed with the national character of the state to which the factory has belonged." He then mentions how treaties were obtained from the Mogul Government, securing for the English factories at Surat and other places the privilege of deciding disputes between the English only and how the servants of the Company bribed the Kazi, the person sent by the Nabob to administer justice to natives, to refrain from doing so. (*Vide, Mayor of Lyons v. E. I. Co.*, 3 M. I. A., 175 at p. 273.)

For the history of the legislative and judicial authority of the Company and of the courts constituted in British India and the law which they were declared empowered to administer, see Cowell pp. 13 to 59.

When the Company claimed to acquire territory and shook themselves free from their dubious role of tradesmen and exchanged the character of subjects for that of sovereign over the territories they occupied and when, therefore, British Courts came into existence owing their origin to a sovereign power which was Christian in its profession and faith, the question had to be met face to face whether they had jurisdiction over the Hindu and Mahomedan religious institutions within their territories and had to be decided one way or other.

Common sense and policy required that the answer to the question should be in the affirmative. We find, therefore, in some of the early cases that the decision was based partly, if not solely, on the difficulty which the courts felt if a contrary decision was to be arrived at. Some of these cases are to be found cited in Morley's Digest. (*Vide*, 1 Morley's Digest. Tit. Religious Endowment, pp 550 and 551 under the Sub-heading of 'Bequest'.)

Thus in *Ramtonoo Mullick v. Bamgopal Mullick* (1829) 1 Knapp., 245. S. C. 12 Eng. Rep. P. C. p. 312 S. C. I. Ind. Rev. Rep. p. 513, a Hindu testator authorised his executors (two of his sons) to perform his and his wife's obsequies out of his estate and provided that any objection by his other sons as regards such expense was inadmissible, but the testator

did not provide the particular amount that was to be expended. He also directed by his will that they should build a temple at Ombica and consecrate the same, that they should make a ghaunt at the Ganges and that they should do some work at Sri Brindabun and at Juggernaut. The master of the Supreme Court at Fort William reported that the expense made by the executors was proper under the terms of the will that the temple at Ombica should be built consecrated and that a temple at Brindabun should also be built and consecrated and that the ghaunt at the Ganges should also be made and consecrated. This was accepted by the High Court. On appeal to the Privy Council it was objected that the expense was not reasonable and proper and that the testator in mentioning that some work should be done at Brindabun could not have meant a temple to be built and consecrated seeing that he mentioned the building of such temple expressly wherever he meant it and that the consecration of the ghaunt was unnecessary. The Privy Council held that the Master's report should be affirmed as regards the building of the temple at Ombica and that as regards the other two matters his report was based on insufficient materials and could not be supported. They directed that the testator not having himself fixed any sum as regards the performance of obsequies, enquiry should be made as regards the usage of families similarly circumstanced as regards the expenses to be incurred on such occasions and that the master should report whether there were any other cheaper religious buildings than temples that could be built at Brindabun and whether ghaunts if made or erected should necessarily be consecrated. In the course of their judgment they observed at p. 247 of Knapp's Rep. that "The interest of sovereigns as well as their duty will ever incline them to secure as far as lies in their power the *happiness* of those who live under their Government, and no person can be *happy* whose religious feelings are not respected. If this were a case between Europeans and Hindus, we would not take a step without the assistance of some persons from India who are acquainted with the usages of that Company with regard to the ceremonies that ought to be observed and the rites that ought to be performed on the death of opulent natives, for we should fear, lest by the judgment which we might advise His Majesty to pronounce, the feelings of the people of Hindustan might be wounded." The actual question in the case was whether a bequest for the performance

of *Stradh.* or annual ceremonies to the deceased was valid in law and was not decided.

Similarly in *Bysack v. Sham Chand Bysack* 1 Bourke, p. 282, the Privy Council upheld a gift to an idol.

So late as 1855, however it was objected in the Bombay Sudder Court in the case of *The Advocate-General v. Vishvanath Atmaram* 1 B. H. C. R. app. 9 that if questions regarding Hindu temples were decided by Civil Courts, it would virtually amount to propagating the Hindu religion and that such questions were therefore not within the pale of Civil Courts.

The Bombay Sudder Court (consisting of *Yardley*, C. J. and *Jackson*, J.) in deciding against that contention and holding that the Supreme Court had jurisdiction to interfere in cases of Hindu and Mahomadan charities and religious institutions observed, "Then it is said that by granting the prayer of this information we shall be propagating the Hindu religion, but that is not the case. If property were left by a testator with general directions to apply the same for the benefits of the natives and we were to build a Hindu temple or place of worship out of such property, the case would be different; but this fund is not open; it is already appropriated to Hindu religious purposes, and we only act ministerially in carrying out the wishes of the donors, subscribers and testators."

In the same case in disposing of the contention that the Advocate-General had no right to inform or interfere in the case of public charities of a religion other than that of the state, Jackson, J. held that the statute 53 Ge. III Ch. 155, S. 3, conferred powers on the Advocate-General similar to those of the Attorney-General in England and observed, "The Attorney-General notwithstanding the state religion is a different one, can undoubtedly inform the Court on behalf of a dissenting charity: *Vide* Lady Hewley's charity and John Wesley's case. There have been enquiries into the change of religion in sects. The Attorney-General interfered in all these cases without question. The corresponding officer of the crown in another country in different circumstances is surely justified in interfering in cases of a different but lawful religion. Where there is a religion tolerated by the state, the crown will see that that

religion is enjoyed, though it may be strongly at variance with the state religion in doctrine, as in the case of Roman Catholic and Unitarian charities. I agree that the Hindu religion is more amply recognised here than the religion of Dissenters in England."

In fact the history of English Law as to the Dissenters bears a strong analogy to the case in hand. In England previously to the Toleration Acts, the Courts of Chancery would not carry out trusts for Protestant Dissenters. Those Acts permitted them to exercise their religion, but did not direct the Court of Chancery to aid them in such trusts; yet ever since those Acts were passed, trusts for the religious purposes of such Dissenters have been enforced by the Court (Boyle on charities p. 42).

Maintenance of a Protestant Dissenting Chapel has been held to be a charitable purpose. *Attorney-General v. Fowler*, 15 Ves. 85. *Attorney-General v. Cock* 2 Ves. sen. 273 (276). *Attorney-General v. Lord Dudley Coop* G. 146, S. C. 14 R. R. 226; *Attorney-General v. Molland Younge* 562, S. C. 34 R. R., 294.

Bequest for the assistance of a Unitarian congregation has also been held valid in the English courts. *Shrewsbury v. Hornby* 5 Hare 406; *Shore v. Attorney-General*, 9 Cl. & F. 355.

A bequest to enable persons professing the Jewish religion to observe its rights has been held to be good; but a bequest not merely for the maintenance but also for the advancement of religion was bad prior to 9 & 10 Vict. C. 59. *In Re Bedford Charity*, 3 Swans 470 S. C. 19 R. R., 107 and *DeOosta v. DePaz* 2 Swans 487, n. S. C. 19 R. 104.

Roman Catholic trusts have also been carried out since the Catholic Emancipation Acts. *Bradshaw v. Tasker*, 2 My. and K. 221, S. C. 39, R. R., 187; *West v. Shuttleworth*, 2 My. and K. 685, S. C. 39 R. R. 327, and *Attorney-General v. Gladstone*, 13 Sim. 7.

Such being the view of the English Courts as regards dissenting religious bodies in England where there exists side by side a state church, it must be admitted that in India where there exists no state church and where the Hindu and Mahomedan religions are more amply recognised, (*vide Vasudev v. Vamnaji*, 1 L. R., 5 B. 80, and *Narayan v. Chintamani*; 1 L. R., 5 B. 393), civil courts cannot refuse to interfere in cases of Hindu and Mahomedan

charities and religious institutions and there exists a stronger reason for British Indian courts exercising jurisdiction over matters connected with such charities and religious institutions than for English courts over dissenting charities.

The *ratio decidendi* of all the above English and Indian cases bearing upon this point is that in order to give civil courts jurisdiction, it is enough if the religion is one recognised or tolerated by the law. The courts in exercising such jurisdiction are not enforcing the particular religion to which the charities in question may appertain they are merely enforcing civil and secular rights in favour of the professors of a religion tolerated by the state.

In the famous *Ranchhod Temple* case *Manmohar Ganesh Tambekar v. Lakshmiram Govindram* I. L. R., 12 B. 247, *West and Birdwood*, JJ. observed "civil courts have jurisdiction to enforce trusts for charitable and religious purposes, having connection with Hindu and Mahomedan foundations and to prevent fraud and waste in dealing with religious endowments, though incidentally it has to take cognizance of religious or caste questions. The religion of the Hindu population being *jurally* allowed, the duties and services connected with it must be deemed objects of public concern and at least as to their physical and secular elements enforceable like other obligations."

This case went up to the Privy Council (See *Chotalal v. Manohar Ganesh Tampeka* I. L. R., 24 B. 50 S. C. 26 I. A. 199) and though this question was not specifically raised, yet the judgment of the Judicial Committee affirming the decision as a whole involved a decision upon this point impliedly. For the Judicial Committee in this case held that there was a religious foundation (Hindu) for which the court had power to frame a scheme, and this could not be done if the court could not interfere as contended by the counsel in the *Shri Vithoba* temple case already referred to (1 B. H. C. R., App. p. 9).

The objection on the score of the propagation of a false or heathen faith not being thus available, civil courts in British India have ample jurisdiction over Hindu temples and other native religious institutions and this jurisdiction is given not because courts want to interfere with the Hindu and other religions, but because courts are bound to protect all trusts, and it is, as already stated,

the duty of the sovereign to protect his subjects in the enjoyment of their religion. When once it is shown that the jurisdiction of civil courts cannot be gainsaid, it cannot equally be gainsaid that courts have jurisdiction to try all matters which are merely ancillary to the general jurisdiction, for it is only by exercising jurisdiction over these ancillary or incidental matters that the court can exercise the right of protection and effective control which devolves on it:

It is in this way courts are competent to deal with questions of ritual though they deal with the same only incidentally. Of course no court, at any rate, no court constituted in British India will try and determine a suit merely to determine what is the ritual of a particular sect. But if a decision on questions of ritual is necessary for the decision of any relief awardable by the civil courts, the courts must enquire into the same and give a decision and cannot deny justice by refusing to entertain such questions on the mere ground that they ought not to interfere in matters of religion.

Thus where a right to a certain office is claimed and it is necessary to determine what exactly is the nature of the office claimed a court of justice will not stay its hand on the ground that a determination as to ritual or religious tenets is necessarily involved in such enquiry.

A simpler and commoner case is where a trustee of a temple fails to perform a certain festival which it has been the usage of the temple to perform and it is either sought to remove the trustee for breach of trust or to compel the trustee to do the act. In this case the Court has clearly the jurisdiction to try such a suit, and in deciding it, it must try the question whether there has been the usage set up, for it is the duty of the court to compel the execution of the trusts of the institution and not to permit the trustee to divert the trust funds from the purposes for which it was intended. (*Vide Elayalwar Reddiar v. Numberumal Chettiar*, I. L. R., 23 M. 298).

Again, suppose a Muttawalli of a mosque pronounces the word "*Amen*" in a loud or low tone in the prayer, and it is objected that this is contrary to the usages of the institution, courts must try whether, according to the usage of the institution and the Mahomedan Law on which it may be based any particular form

of ritual is binding on the Muttawalli and whether the pronouncing of the word "*Amen*" in any particular tone is contrary to the usage. *Vide Fuzl Karim v. Haji Mowla Buksh*, 18 I. A. p. 52 Sc. I. L. R. 18 C 448.

Similarly where the question, is as to the persons that are the objects of a religious charity, civil courts are clearly competent to try the same, though a decision on the same may involve inquiry into religious matters. Where the plaintiffs assert that they alone have the right to enter the *sanctum or garbha* in a Hindu temple and to worship there as being the members of a certain class, and that the defendants are not members of that class and not entitled to enter such *sanctum*, it has been held by the Bombay High Court that the civil courts have jurisdiction to entertain and decide such questions. *Anandran Bhikaji Phadke v. Shankar Daji Charya*, I. L. R. 7 B. 323.

Similarly where a person is expelled from caste either by the caste at a meeting (*Vide Krishnasami Chetti v. Virasami Chetti*, I. L. R., 10 M. 138, *Lalji Shamji v. Walji Wardhman*, I. L. R., 19 B. 507; *Jagannath Charu v. Akali Dassia*, I. L. R., 21 C. 463; and *Keshav Lal v. Bai Girja*, I. L. R., 24 B. 13) or by a religious superior, (*Vide Appyya v. Padappa*, I. L. R., 23 B. 122, *Musari v. Suba*, I. L. R., 6 B. 725; *The Queen v. Sankara*, I. L. R., 6 M. 381, *Ganapati Bhatta v. Bharati Swami*, I. L. R., 17 M. 222; and *Basumati Adhikarini v. Budram Kolika*, I. L. R., 22 C. 46) or where a person marries a widow, (*Venkatachalapati v. Subbarayadu*, 13 M. 298,) and it is alleged that by reason of such expulsion or of such re-marriage, such person had not the right to enter a temple or has lost certain benefit which he would otherwise be entitled to, the courts have jurisdiction to try whether the individual in question has been duly expelled according to caste usage and whether the expulsion or marriage results in the consequences alleged.

In case of *The Advocate-General Ex relatione Daya Mahammad v. Muhammad Husen Huseni*, 12 B. H. C. R. 323 (at p. 330), *Arnold, J.* held that where a court in the exercise of its charitable jurisdiction was called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the parties would be regulated by a reference to what upon an enquiry might turn out to have been the religious tenets

held by the committee in its origin or foundation and that a minority however small, holding fast by these tenets would be entitled to prevail against the majority, however numerically large, which could be shown to have receded from or renounced them. And hence in that case, the court went into the question what the original tenets were and what the tenets of the seceders were in order to determine who were entitled to the benefits therein contended for. It is not intended here to discuss fully the limits of the jurisdictions of the court in matters religious. We may have to consider such limits hereafter but we trust it is clear that both on principle and according to precedents, the courts are bound to carry and protect the trusts made in favour of Hindu and Mahomedan religious and charitable endowments.

NOTES OF INDIAN CASES.

Gulkandi Lal v. Manni Lal, I. L. R., 23 A. 219:—We are unable to follow this decision. A compromise is entered into in a suit, but the parties did not ask for a decree in terms of it and the suit was withdrawn without leave to sue again. A second suit is brought and it is held to be barred by S. 373 of the Code. If the second suit were based upon the old cause of action there is no doubt that the suit would be barred. But if the suit be one based upon the compromise, the cause of action is the breach of this new agreement and we fail to see what application S. 373 has.

Sheo Narain v. Beni Madho, I. L. R., 23 A. 285:—There is no doubt that some difficulty arises from the decisions in *Sukho Bibi v. Ram Sukh Das* 5 A. 263 and *Raghubar Diab v. Madan Mohan Lal* I. L. R., 16 A. 3. But there is no doubt that the Allahabad High Court has arrived at the right decision following the Madras case *Sornivalli Ammal v. Muthayya Sastrigal* I. L. R., 23 M. 593. An agreement to refer matters in dispute to arbitration is no doubt a contract and if that alone has to be enforced assuming that it can be enforced by suit, the suit will be one for specific performance of a contract. The next step is, supposing the parties agree to be bound by the opinion of a third person, call it by any name you will, whether a suit to enforce obedience to that opinion is one for specific performance of a

contract. This may loosely be termed a suit for specific performance, but the award of an arbitrator is of the nature of a decision by a tribunal constituted by the parties and the enforcement of that decision is not specific performance of a contract, at all events within the language of the Article of the Limitation Act.

Madan Mohan v. Rangil Lal, I. L. R., 23 A. 288:—We are unable to follow the learned judges in the conclusion to which they have arrived in this case. In the first place, contracts by a minor are assumed to be avoidable. Though there is considerable authority in support of this position we consider it extremely doubtful. Supposing, however, that that view is correct, the minor may avoid the contract or the transfer of property (if it be a case of transfer) on attainment of majority. Immediately on attainment of majority, the same person makes a sale in favour of another free of all incumbrances. That is certainly evidence of an intention to treat the mortgage as not binding and no acquiescence can be set up to validate the mortgage. There is no special proceeding necessary to avoid avoidable mortgages. There is no period of time apart from the statute of limitation for the communication of the avoidance. The suit arose immediately after the sale and the question of the validity of the mortgage put in issue. We are therefore of opinion that the learned Judges were not right in treating the mortgage as valid against the purchaser.

Takur Singh v. Nohkhe Singh, I. L. R., 23 A. 309.—There was a gift to a daughter. There is no presumption that such a gift is only of a life estate. It is common enough to make a gift of property to a daughter by way of Stridhanam. The words in the instrument that the donor and his heir should make no claim against the donee in respect of the property were quite inconsistent with a limited estate in the daughter and we are disposed to think that the learned Judges are right in the construction they have placed on the instrument.

Batul Begam v. Mansur Ali Khan, I. L. R., 24 A, 17 :—The decision of the Judicial Committee is somewhat instructive. The suit was to enforce a right of pre-emption and the question arose as to the period of limitation applicable. The person against whom the claim was made was a mortgagee by conditional sale whose title to the share mortgaged became absolute on the expiry of the year of grace. Their Lordships held that the time began to run not from the date of the mortgage, nor from the date on which the mortgagee obtained his title by suit for the property, but from the date of the expiry of the year of grace. Their Lordships had no difficulty in getting rid of Art. 10, because no physical possession could be obtained of the share. The conflict then was between Art. 144 and Art. 120. The former Article provides for suits for possession of an interest in immoveable property not otherwise provided for and Art. 120 is the residuary Article which provides (for suits) for which no other period is applicable. It follows if that the suit has nothing to do with the possession of immoveable property one must look to Art. 120 before resorting to Art. 144. If the suit is one for mere possession there is no doubt that Art. 144 should be first resorted to and held applicable, but their Lordships viewed the suit as primarily one to set aside the claim of the first purchaser and as one for possession only in consequence. Art. 144 was therefore held to be inapplicable and the case was brought under Art. 120.

Ahimsa Bibi v. Abdul Kader Saheb, I. L. R., 25 M, 26 :—Several questions of importance have been considered in the very instructive judgment of Justice *Bhashyam Aiyangar* in this case. The scope of sections 7 and 8 of the Limitation Act which are not a little puzzling to our courts has been considered. The learned judge clears the ground by laying down the proposition that in a case of contract the representatives of one of the parties form one body and their rights as against the obligor are joint and therefore, if one of such representatives happens to be a minor at the date of the accrual of the cause of action, time does not run against any of them until the minor attains majority and this although as between themselves the representatives are tenants in common.

His Lordship appears to doubt the correctness of the decision in *Barber Maran v. Ramana Goundan*, I. L. R., 20 M, 461, where

Shepherd, J. held that payment of one of two co-mortgagees operated as a valid discharge against the other. But however that may be, the case of co-heirs was clearly one in which one could not give a valid discharge, so as to operate against the rest.

In the light of the remarks made by the learned judge in this case, more than one earlier decision of the Madras High Court on the scope of section 8 may have to be reconsidered.

SUMMARY OF RECENT CASES.

Contempt of Court—Company—Compulsory winding-up—Circular to shareholders—Misrepresentations—Voluntary winding-up—Misleading Court.

In re Septimus Parsonage & Co., (1901) 2 Ch. 424.

Pending a creditor's petition to wind up the affairs of a company, the directors with the object of procuring a voluntary winding-up of the company and thereby defeating the creditor's action issued a circular to the shareholders containing gross misrepresentations. On a motion for contempt of Court, *Wright*, J., held that the directors were guilty, as they intended to mislead the court as to the real views of the shareholders and prevent the court from passing a compulsory order to wind up the company.

Will—Construction—Annuity to widow—Trust—Death of widow.

• *In re Yates—Yates v. Wyatt* [1901], 2 Ch. 438.

The testator after giving legacies to his wife gave her a further annuity of 300 £ until his daughter attained 21 years to be applied towards the maintenance and education of his daughter. The question arose whether the annuity ceased to be payable on the death of the widow before the daughter attained 21. *Byrne*, J. held that though it was a gift to the widow, it was in trust for her daughter and that the annuity did not cease on the death of the widow.

*Will—Illegitimate children—Construction—Class gift.**In re Du Bochet—Mansell v. Allen* [1901], 2 Ch. 441.

The testatrix bequeathed her residuary estate to the daughters of her nephew R. R was then living with a woman reputed to be his wife and had three daughters by her, two born before the date of the will and the other afterwards. Just before the time of distribution it was discovered that R did not marry her till after the death of the testatrix. But the testatrix treated R's reputed wife as his wife and the three daughters as his legitimate children. On these facts *Joyce, J.* held that the first two daughters took the legacy but that the daughter born after the will did not. Though the first two daughters were illegitimate, they were living on the date of the will and were in the contemplation of the testatrix objects of the gift. But the daughter subsequently born was not one of the objects of gift on the date of the will and was not properly included in the description "daughters of my nephew R". It is certainly curious that the belief of the testatrix in the marriage of R and his reputed wife and in the legitimacy of his children should be fraught with different results in the case of the different children and it is difficult to understand why the intention of the testatrix should guide the construction in the case of the children born prior to the will but should be excluded in the case of those born afterwards. It will be seen that on the date of her death, the testatrix believed that the third daughter was benefited by the legacy equally with other two.

Company—Trade name—Foreign firm—Market—Competition—Imitation—Injunction.

La Societe, etc., Panhard Et Levassor v. Panhard Levassor Motor Company, Ltd., [1901], Ch. 513.

A foreign trader, whose goods were frequently imported into England has a sufficient English market to restrain a piracy of his trade name.

Where a number of persons started a company under a name closely resembling the name of the plaintiffs with the fraudulent object of obtaining the benefit of their reputation and causing loss to them, they were restrained by injunction from using the name in connection with the business.

Practice—Costs—Two issues—Success of plaintiff on one issue—Dismissal of suit on another issue.

Brown v. Houston [1901] 2 K. B. 855 C. A.

In an action for libel, defendant pleaded justification and privilege. The plea of justification failed, but the action was dismissed on the ground of privilege. The plaintiff was given costs on the issue of justification. It was held on the authority of *Harrison v. Bush*, 5 E. & B. 344 that the plaintiff was not entitled to have costs of witnesses whose evidence related not only to the plea of justification but also to the plea of privilege. This rule may work hardship in many cases, but it was pointed out by *Vaughan Williams and Stirling*, L. JJ. that a special order as to costs may always be obtained from the court so as to avoid any such hardship.

Damages—Measure—Sale without permission of principal.

Michael v. Hart & Co., [1901] 2 K. B. 867.

Certain stock-brokers agreed with their principals that they would, at any time before the settling day, sell their shares *if so directed* by them. The brokers, however, sold the shares before the settling day without the permission of the principals. In an action for account, the principals were held entitled to be credited with the highest price for which shares sold before the settling day. The principals would not probably have realised the best prices even if the shares had not been wrongfully sold; but every presumption should be made against the wrongdoer and not in his favour.

Divorce—Cruelty—Insult—Particulars.

Bishop v. Bishop [1901] P. 325.

In a petition for divorce, the wife, for the purpose of establishing cruelty on the part of the husband, alleged that he used abusive and insulting language to her in the presence of servants and guests. On the application of the husband, she was directed to furnish particulars including the names of the guests and servants in whose presence she was insulted.

Probate—Letters of Administration—Married woman—Foreign domicil—Consent of husband.

In the Goods of Vannini [1901] P. 330.

Where a married woman domiciled abroad died leaving a will, probate was refused to the executor even though the husband consented to its issue; but with his consent, the court issued a grant of administration with will annexed.

Will—Testator—Reading over—Testator's capacity—Solicitor—Inadvertence—Knowledge—Presumption.

Garnett-Botfield v. Garnett-Botfield [1901] P. 335.

It is no doubt a general rule of law that a competent testator who has read the will or has had the will read over to him must be held to have approved its contents. See *Guardhouse v. Blackburn*, L. R. 1 P. & M. 109. But it is open to the court to find as a fact that the will had not been read over in a proper way and that the testator did not understand the contents of the will executed by him.

In this case there was the clearest evidence that the last will did not represent the testator's intentions in one respect. The solicitor admitted that the mistake was owing to his inadvertence in drafting the will, but he did not produce any written instructions of the testator. The judge was clearly of opinion that there had been a mistake by the solicitor. On the other hand he was strongly of opinion that the testator must have read the will though he perhaps did not appreciate the effect of this particular clause and relied entirely upon the solicitor to carry out his intentions. Under these circumstances, the President refused to say that the will was not properly read over to the testator or was not approved by him and granted probate of the will.

Will—Executor according to the tenor.

In the goods of Nicholas Way [1901] P. 345.

The testator appointed a person to hold and administer in trust all my estate. Held that though there was no direction to pay debts, the word *administer* was sufficient to constitute him executor according to the tenor of the will.

Bankruptcy—Trustee—Lien—Trustee becoming bankrupt—Trustee in bankruptcy—Private creditor—Interpleader.

Jennings v. Mather [1902] 1 K. B. 1. C. A.

Where a trustee under a creditor's deed who was directed to carry on a business for the benefit of creditors incurred liabilities for the business on his own personal responsibility and afterwards became bankrupt, held by the Court of Appeal that the trustee in bankruptcy was entitled to hold the goods belonging to the business and that the person who held decrees personally against the bankrupt was not entitled to take the goods in execution. Though the debt was borrowed for the business, the decree was against the person of the bankrupt and did not entitle the decree-holder to proceed against property held by his debtor in trust. But the trustee in bankruptcy was entitled to take possession of the goods as, in place of the bankrupt, he was entitled to a lien on them for expenses incurred in execution of the trust. On an interpleader between the decree-holder of the bankrupt trustee and the trustee in bankruptcy, it was held that the latter was entitled to possession of the goods.

Assignment—Indefinite amount—Right of Assignee to sue.

Jones v. Humphreys [1902] 1 K. B. 10.

An assignment in writing, for consideration, of an indefinite part of a debt does not entitle the assignee to sue the debtor.

An assignee of an ascertained part of a debt may perhaps sue in his own name.

An assignment of *so much and such part of a fund as would be necessary to pay the assignee the sum of 22£ 10s. or of any further or other sums in which I may hereafter become indebted to you* is of an unascertained part of it and is not an assignment which will enable the assignee to sue in his own name under the Judicature Act.

Easement—Light—Prescription—Extraordinary light—Special purpose—Measure of right.

Warren v. Brown [1902] 1 K. B. 15 C. A.

In determining the extent of the plaintiff's prescriptive right to light, there is no rule that he is only entitled to so much light

as would be required for the purpose of habitation or business ordinarily, and there is no such ordinary standard or measure of light. The question in every case must be whether the house has been materially affected by the obstruction to light, having regard to the ordinary uses by way of habitation or business to which the house has been put or may reasonably be supposed to be capable of being put.

For some years prior to the obstruction of light, the plaintiff was using his house for carrying on a business which required an extraordinary amount of light. The obstruction diminished the light so as to affect this business, but left enough for all ordinary purposes. *Held* that the light had been substantially interfered with and that the plaintiff was entitled to damages.

Kelk v. Pearson, L. R. 6 Ch. 809 approved and followed; *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421 and *Dickinson v. Harbottle*, 28 L. T. (N. S.) 186 overruled.

Criminal Law—Perversion of the course of justice—Publication of articles pending trial.

Rex v. Tibbits [1902] 1 K. B. 77.

It is a perversion of the course of justice to publish articles in a newspaper affecting the character or conduct of persons under trial, which would not have been evidence against them. The publication of such articles may be punished either by dealing with the offenders summarily for contempt of court or by regular indictments. In such indictments for perverting the course of justice it is no defence to say that the prisoners were afterwards convicted; and there was therefore no perversion of justice by the publication; because the conviction itself may be due to the perverting influence of the publication.

Bankruptcy—Petition by creditor—Debtor's books—Evidence of debtor.

In re X. Y.—Ex parte Haes [1902], 1 K. B. 98 C. A.

At the hearing of a bankruptcy petition by a creditor, he is entitled to call for the debtor's books to prove his allegations and also to examine the debtor as a witness in support of his application.

Will—Probate—Torn will afterwards pasted—Minors interested on intestacy—Guardian.

In the Goods of Brassington [1902], P. 1.

Probate of a will, proved to have been by mistake torn by the testator and afterwards pasted by himself, was granted on the application of a sole executrix without the minors interested on intestacy being represented in court by guardians *ad litem*.

Will—Execution—"In the presence" of a witness.

Brown v. Skirrow [1902], P. 3.

A testator should sign the will in the *visual* presence of two witnesses or acknowledge the signature in their presence, and they should afterwards attest it.

Where a testatrix signed her will in the presence of one witness who signed it immediately afterwards and another person who was on the other side of the shop and did not see the testatrix sign the document, attested it on being told by the testatrix that the document was her will: *Held* that the will was not properly executed, because it was not executed in the presence of two witnesses and it was not acknowledged in the presence of two witnesses, who *afterwards* attested it, because one witness had attested it before. Both attestations must be after signature or acknowledgment in the presence of witnesses.

Landlord and Tenant—Notice to quit—Validity of Notice.

Soames v. Nicholson [1902], 1 K. B. 157.

Where an agreement of tenancy provided that the tenancy was to commence on May 1, that rents should be payable on quarter days, *subject to three months' notice on either side at any time to terminate this agreement*, *held* that the notice need not expire on one of the four quarter days but may expire on any day. *Bridges v. Potts*, 17 C. B. N. S. 314 approved and followed.

JOTTINGS AND CUTTINGS.

The Madras Law College:—The new constitution of this College provides for a Principal and a Vice-Principal to be appointed by the Secretary of State for India from the English Bar. If there

is any department of knowledge for which the Indian intellect has shown any aptitude, it is the department of law and there is a large and growing body of men from whom excellent selection can be made for these two officers. The Secretary of State has not been particularly happy in his selections for the Indian Bench where the appointment carries such large salaries as four or five thousand rupees a month. It stands to reason that the Principalship of the Law College and still more the Vice-Principalship are not particularly attractive in the English Market; for the salaries attached to these offices in the very nature of things, bear but a small proportion to the judicial salaries in the gift of the Secretary of State. An English Barrister restrained from the practice of the profession and bound to remain content with salaries which, though good in themselves, are nothing in comparison with the prices of the profession must necessarily be a fifth rate article. The Secretary of State appears to have felt considerable difficulty to find a man to fill the place of Vice-Principal. We think it is a slur cast upon the Indian Bar to confine the selection to an English Barrister and we cannot persuade ourselves that the constitution is devised in the interests of this country or of the study of law as a science. Apart from the circumstance that there are numerous peculiarities in the systems of law in force in this country with which an English Barrister cannot in general be acquainted, his proficiency even in respect of those fundamental principles which lie at the foundation of all civilized systems of jurisprudence cannot compare very favourably with that of the average Indian lawyer of the Presidency towns. The native community are to protest against this jobbery devised in the interests of needy first cousins of men in authority here or in England.

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Recovery for damage resulting from nervous shock:—It is interesting to note the trend of Judicial opinion on the question of allowing recovery for injuries resulting from nervous shock. There is little discussion where the defendant acts wilfully, but where his act is merely negligent, the courts have adopted widely dissimilar views. In New York, Massachusetts, and the English Privy Council the right to recover has been denied. *Mitchel v. Rochester Ry.*, 151 N. Y. 407; *Spade v. Lynn etc.*, R. R. 172 Mass, 488; *Victorian Ry. v. Coultas* L. R. 13 App. Cas 222. In South Carolina, Minne-

sota, and Ireland strong decisions have been rendered in the plaintiff's favour. *Mack v. South, etc.*, R. R., 52 S. C. No. 323; *Purcell v. St. Pall Ry.*, 48 Minu., 134; *Bell v. Great, etc., Ry.*, 26 L. R., Irs. 428. In a recent English case the defendant's servant negligently drove a van through the window of the room in which the plaintiff was sitting. There was no physical contact, but the court allowed an action, as the plaintiff's fright was such as to cause a miscarriage two months later. *Dulieu v. White*, 1901, 2 K. B. 669.

The opinion of Kennedy, J., compact and forceful, goes for towards overcoming the objections upon which the contrary decisions are founded. The statement that there is no general duty of care to not frighten others, he argues, is too broad. There is a duty not to injure others. The only question is whether there is an actionable breach of such duty if one is made ill in body by negligence which does not break his ribs, but shocks his nerves. In answer to the objection that as fright is not actionable, so no consequence of fright can be, he quotes Sir Frederick Pollock, that "Fear taken alone falls short of being actual damage,..... because it can be proved and measured only by physical effects, and where measurable damage does result, it is evident that its primary cause was the act which produced the fear, not the fear itself. On the question of remoteness Kennedy disagrees with Coultas' decision. He asserts that if the injury follows the shock as its direct and natural effect, even though not immediate in point of time, it is still a proximate consequence of the shock. The grounds of public policy are lastly examined, and dismissed as insufficient to bar the plaintiff in meritorious cases, and as involving an unwarranted distrust in the capacity of legal tribunals to get at the truth.

The courts as a rule do not expressly recognise that the ultimate question in such cases is one of expediency, but base their decisions on other grounds. A distinction has apparently been drawn between external effects of shock and those purely internal. Thus of the plaintiff faints the ensuing damage is too remote. *Victorian R. v. Coultas*, *Supra*. Yet if external injury is sustained in jumping off a coach he may recover. *Jones v. Bayee*, 1 Stark. 493. If his horse bursts a blood vessel and dies the owner can get no compensation. *Lee v. Burlington*, 85 N. W. Rep. 618. But if

it runs away the owner is recompensed for resulting damage. *Wilkins v. Day*, L. K., 12 Q. B. D. 110. This is not a sound distinction. All organs, internal and external, nervous and muscular, are equally physical, and should be equally protected by the law; and the psychological fact should be recognised that a manifestation of fear through the nervous system is as proximate an effect as a manifestation through the muscular system.

Granting that logically physical damage is often the direct result of nervous shock, though not contemporaneous with it, the question still remains, is it wise to permit recovery without proof of impact or immediate palpable injury? The objection that the practical application of the rule would be difficult is hardly convincing. It is not easy to translate any personal injury into dollars and cents, yet courts and juries are doing it every day. The argument *ab inconvenienti* therefore is not insurmountable, and also it must be remembered that the plaintiff has not only to claim that that he has suffered, but also to prove it. It is urged by many that the courts will be flooded if such claims were allowed; and that three-fourths of the claims would be fraudulent. Probably litigation would increase: possibly it should. Still, the threatened load has not yet overtaken those courts which have granted relief. The principal case is a decided addition to the controversy both as a strong decision, and for its sound logic. Section 10, *Harvard Law Review*, 387, 52 Cents. L. J. 339.

Harvard Law Review.

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Anticipatory breach of contract as excuse for non-performance:—The usual statement of the doctrine of anticipatory breach is to the effect, that when one party to an executory bilateral contract expresses an intention not to perform, the other party may treat the contract as broken and sue at once or may ignore the repudiation, in which case the obligation upon each continue effective. *Frost v. Knight*, L. R. 7 Ex. 3. Illogical as it is to make a breach of contract depend on the promisee's election, considerations of convenience furnish perhaps a justification. At least so much of the doctrine of anticipatory breach as gives the right to sue immediately, is firmly established. *Boehm v. Horst*, 178 U. S. 1; 14 Harv. Law Rev., 433, note 4. But the alternative

proposition, that the repudiation if not immediately acted upon is inoperative, has received almost no direct adjudication, although usually asserted as *dictum*, when the right to sue immediately is recognized. In a recent case, however, the supreme court of Georgia treating the rule as established by these *dicta* decides that a repudiation by the plaintiff is no excuse for a subsequent non-performance by the defendant, when it is not shown that the defendant has elected to treat the contract as broken by the repudiation *Smith v. Ga. Loan, etc., Co.*, 39 S. E. Rep. 410. One other direct decision where the point was raised in a slightly different way is in harmony. *Dalrymple v. Scott*, 19 Cont. App. 477.

A doctrine resulting in such decisions as these is objectionable. The principle of fairness, introduced under the terms of implied conditions, excusing one party from performance on the *actual* failure of the counter performance, applies with equal force when it appears that there is *going to be* such failure. *Ripley v. McClure*, 4 Exch. 345; *Lowe v. Harwood*, 139 Mass. 133. There is also the well recognized rule that forbids a plaintiff increasing the damages by a useless performance after the defendant has expressed his intention not to carry out the contract. *Clark v. Marsiglia*, 1 Denio, 317., *Chicago, etc., Co. v. Barry*, 52 S. W. Rep. 451 (Tenn). These considerations of fairness are not only in evident conflict with the doctrine of the principal case, but they are in accord with the commercial understanding. Where one party repudiates the contract, no course is more natural than the other to remain passive, either hoping for a future fulfilment of the agreement, or looking for an opportunity to contract elsewhere. This passivity ought not to render the repudiation if it still continues, inoperative as a defence. Such a course is also advantageous to the one who repudiates, as he may retract his repudiation, unless it has been acted upon. *Nilson v. Morse*, 52 Wis. 240. A further difficulty is that courts leave us quite in the dark as to what act, if any, other than immediately bringing suit, will be sufficient to render the repudiation operative. It would seem wise, therefore, not to extend the doctrine of anticipatory breach beyond its first proposition, the immediate right to sue. If the injured party elects not to sue at once, the ordinary rules of contract should govern, and the

repudiation should be an excuse for his subsequent non-performance. It is therefore unfortunate that Lord Cockburn's suggestion of compelling the defendant to sue at once or to continue to perform should have been recently strengthened by an actual decision.

Harvard Law Review.

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The following is an extract from an article on 'Mixed questions of Law and Fact' by Frederick Green in the *Harvard Law Review* :—

If the foregoing observations are well founded, it would seem that there remains a question which, in its nature, is a question of law wherever the legal standard which is to be applied to the facts is not stated in terms so definite and clear as to leave no room for difference of opinion as to what it is that the law requires. Where there is room for such difference of opinion, the tribunal which applies the law to the fact, that is to say, which decides whether the facts as found fulfil the requirements of the law as stated, interprets the law in making its decision, and really decides what its requirements are. In a general verdict the jury makes the application of law to fact; where the verdict is special, the judge makes it.

There is room for such difference of opinion, where the case requires the drawing of an inference of fact as to the character of the primary facts proved, such as whether conduct is prudent, delay reasonable, or a prosecution founded upon probable cause. For the question of character so raised is a question of opinion and of degree, and hence the words in which it is expressed are necessarily indeterminate, while the decision reached can only be stated in the terms of the rule of law which is to be applied to it. A special verdict is consequently impossible, and the same tribunal which characterises the facts must interpret the law. For example, the jury in an action for negligence can only say whether the defendant was or was not negligent, and that mixes a decision as to the character of conduct with a decision as to the degree in which a man is required by law to exercise foresight, wisdom, and self-control. Since law and fact are thus inseparable, the jury must pass upon both, or the court must pass upon both.

In such a situation, it would seem reasonable to ascertain whether the question of fact or of law is the more difficult and important, and to assign the decision of both to jury or to judge

accordingly. Such a result seems to have been reached in practice; for juries pass upon questions of negligence, where the facts are complex and go to the root of the case; and courts pass upon questions of probable cause, where the relevant facts are comparatively simple, and the jury may well be believed more likely to err as to the legal standard against which they are to be measured than the judge to err as to the inference of fact to be drawn from the primary facts as found.—*Harvard Law Review*.

REVIEWS.

• *The Law relating to Improvements in British India.* By Miam Mohammad Shafi; Published by Rai Sahib M. Gulab Singh and sons, Lahore. Price Rs. 2.

The Law of Improvements is an interesting subject and a book dealing with it in a satisfactory manner is a desideratum. We do not think that Mr. Shafi has supplied this want. His book is a meagre compilation of the provisions of some of the Indian statutes dealing with the subject and the decisions bearing upon them. We hope that the imperfections of the book will disappear in the 2nd edition which Mr. Shafi expects to bring out and that the utility of the book, now very small, will be enhanced in the next edition.

A Manual of Legal Maxims, words, Phrases, etc. By Desai Narotam, Pleader, High Court, Bombay. Published by Messrs. Srinivasa Varadachari and Co., Triplicane, Madras, 1902. Price Rs. 5.

• Legal Maxims are the embodiment in a terse form of the fundamental principles of law, and though very often expressed in too wide a manner or so as to convey only one's side of the question serve as valuable aids to memory. The maxims used in English-text books and decisions are mostly expressed in Latin; and an Indian student who is generally ignorant of Latin and who has not got access to the necessary books of reference finds a difficulty in understanding these maxims. This difficulty will be removed by the use of Mr. Narotam's book, which gives an explanation of all Latin maxims and expressions likely to be met with in

law books. The notes of administrative cases added under the more important maxims serve to enhance its usefulness.

We beg to acknowledge receipt of the following publications:—

A Manual of the Principles of Equity BY JOHN INDERMAUR, published by Geo. Barter, Office of the Law Students Journal, London; Fifth Edition, 1902.

Best on Evidence BY J. M. LALY, published by Messrs. Sweet and Maxwell, Ltd. 3 Chancery Lane, London, Ninth Edition, 1902.

A Hand book of Criminal Law BY N. RAMASWAMY AIYAR; published by Messrs. G. A. Natesan & Co., Esplanade Row, Madras; Price Rs. 2.

Columbia Law Review	for	...	...	February.
Green Bag	"	...	...	do.
Kayastha Samashar	"	...	...	do.
Canadian Law Times	"	...	...	do.
American Law Review	"	...	...	do.
Virginia Law Register	"	...	...	do.
The Medico-Legal Journal	"	...	...	do.
Law Magazine and Review	"	...	...	do.
Case and Comment	"	...	...	do.
Indian Review	"	...	...	do.
The Bombay Law Reporter	"	...	...	do.
The Law Students' Helper	"	...	...	do.
The Lawyer	"	...	...	do.
Punjab Law Reporter	"	...	...	do.
The Australian Law Times	"	...	...	do.
Canada Law Journal	"	...	...	do.
The Law Students' Journal	"	...	...	do.
The Kathiawar Law Reports	"	...	...	do.
The Digest	"	...	...	January.
Burmah Law Reports	"	...	...	do.
General Digest	"	...	...	do.
Harvard Law Review	"	...	...	do.
Law Notes	"	...	...	do.
American Lawyer	"	...	...	do.
Weekly Notes	"	...	...	do.

The Madras Law Journal.

PART III.]

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•VOL. XII.

A QUESTION OF INTERNATIONAL LAW:•

Arrest of an escaped prisoner of war on board a foreign ship in British waters.

A BOER prisoner of war named Villiers escaped from the camp at Trichinopoly where he was confined, and made his way to Pondicherry. It is expected that he would there embark for Europe on board a French steamer. As it is likely that the steamer would call at Colombo on its way, the interesting and important question has been raised whether the British authorities can search the steamer and re-arrest Villiers if found on board, either at that port or in the British territorial waters. Different considerations arise according as the vessel is a merchant ship or a ship of war. I shall consider the former case first, it being of more usual and likely occurrence.

The ports and rivers of a State are fully parts of its territory, and so are its territorial waters. A State, therefore, has *prima facie* sovereign jurisdiction over all vessels, including foreign vessels, found in them. As against this principle of territorial sovereignty, may be put forward the doctrine of the ex-territoriality* of ships—that is to say, that by a fiction of law, they are to be considered as floating pieces of the territory of the State to which they belong. This

* N. B.—Vide the Remarks of the Judicial Committee in the recent case of the Secretary of State for Foreign Affairs, I. L. R., 25 B., p. 1, S. O. (1901) A. C. 373, where the Judicial Committee refused to extend the fiction of ex-territoriality further than was necessary, and held that a British subject residing in Zanzibar and acquiring land in such place must be governed as regards such land by the law of the situs though, under a treaty with the British Government and the Zanzibar State, he may have been granted rights of ex-territoriality as regards person and property.—Ed.

may be a beautiful figure of speech, but as a basis of legal doctrine, it is both mischievous and misleading. The long-established, unquestionable and universal practice of the nations is inconsistent with it. Even on the high seas, where, more than elsewhere, the doctrine can have free play, as there it is not in conflict with territorial rights, it is ignored and departed from in serious and important respects, in a way calculated to throw grave doubt on its correctness. For example, Great Britain has long and strenuously contended for the right to enter foreign vessels on the high seas and impress her subjects who might be found on board. Lord Stowell said, "The great and fundamental principle of British maritime jurisprudence is, that ships upon the high seas compose no part of the territory of a State. The surrender of this principle would be a virtual surrender of the belligerent rights of the country." But though it is now settled that entry for such a purpose would be unlawful, in a time of peace, it is well established that, during war, a belligerent has the right to search neutral vessels and seize them for acts done by them opposed to his interests in the war—for instance, breach of blockade or carriage of articles contraband of war. If they were really portions of the territory of the state to which they belonged, they could, of course, not be entered upon, much less seized. And before the Declaration of Paris, it was even the practice of England, to seize goods belonging to the enemy, although not contraband, on board neutral vessels on the high seas. Again, States, like England, which do not exercise any jurisdiction over their subjects in respect of acts done by them in foreign countries, * reserve to themselves such jurisdiction in respect of their acts on board foreign vessels on the high seas. Such being the case even on the high seas, the doctrine in question is much less admissible in the ports, rivers and territorial waters of another state, where it is in direct conflict with the principle of territorial sovereignty. It is admitted on all hands that a large amount of jurisdiction does exist, and no writer has had the hardihood to assert the absence of all jurisdiction, which, however, is but the logical and necessary deduction from the doctrine. There are, no doubt, certain limitations to the exercise of such jurisdiction, but they are rather exceptions and are thrown upon their defence for their justification.

* There are some exceptions to this rule. See my article on 'The grounds of Criminal Jurisdiction,' VII M. L. J. 305.

It would be dangerous to base our stand upon an illusory metaphor and seek to determine unsettled questions with its help, much more to examine existing practices in its light.

“A foreign merchant vessel going into the port of a foreign state,” says Sir Robert Phillimore in his judgment in the celebrated case of *R. v Keyn*, L. R. 2 Ex. Dn. at pp. 82, 83, “subjects herself to the ordinary law of the place during the period of her commorancy there; she is as much a *subditus temporaneus* as the individual who visits the interior of the country for the purposes of pleasure or business. It may be that the foreign State, influenced by considerations of public policy or by treaty obligations, chooses to forego the exercise of her law over the foreign vessel and crew, or exercises it only when they disturb the peace and good order of the port. This is the course which France has usually pursued..... I cannot entertain any doubt that in this country a foreign sailor, complaining of the ill-treatment of his master on board a foreign ship in an English port, would be entitled to the protection of an English Court of Justice.” This is the practice followed not only by England but by all other civilized States, except France alone, which, as mentioned in the passage cited, takes a view peculiar to itself and refrains from exercising jurisdiction in respect of acts relating solely to the internal discipline of the vessel, or even crimes and lesser offences committed by one of the crew against another, when the peace of the port is not affected, but interferes when crimes or lesser offences are committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised (*Hall's International Law*, 4th Ed. 210.) And even the exceptional practice of France is based not upon any inherent want of jurisdiction but rather upon the balance of convenience in allowing the internal affairs of a foreign vessel to be regulated by its own State.

With regard to territorial waters, a more general practice of abstention from the exercise of jurisdiction, similar to that of France even in her own ports, prevails. It is recognized, for example, that other states have a right of innocent passage through such waters. On the question of the matters in respect of which jurisdiction may be exercised, Hall says, (p.

214), "It seems reasonable to conclude that states, besides exercising such jurisdiction as is necessary for their safety and for the fulfilment of their international duties, ought to reserve to themselves such ordinary jurisdiction as is necessary to maintain customs and other public regulations within their territorial waters, and to provide, both administratively and by way of civil and criminal justice, for the safety of persons and property upon them and the adjacent coasts." And it is usual not to take cognizance of offences both commencing and ending on board the vessel and not taking effect externally to her, or affecting the general peace. In *R. v. Keyn*, (L. R. 2 Ex. Dn. p. 63) all the thirteen judges were unanimously of opinion that in matters connected with navigation, or with revenue, local fisheries or neutrality or affecting its own interests, every state had full jurisdiction over its territorial waters. But the majority held that there was no general usage as to nations having assumed the power of making foreigners or foreign ships passing through such waters amenable generally to the local criminal law, but that there would be nothing wrong or contrary to international law in assuming such a general criminal jurisdiction by means of a statute. Accordingly, the Territorial Waters Jurisdiction Act, 1878, was passed, asserting sovereignty over British territorial waters and conferring jurisdiction on British Courts over acts done within such waters. I should perhaps explain what is meant by saying that a state can exercise jurisdiction for purposes of neutrality. When two states are at war, a neutral state is under a duty not to permit either belligerent to commit acts of war within its territories. Again, if a belligerent captures a ship of the enemy and brings it into neutral waters before the property has vested in him according to the laws of war, or if he brings into such waters a prisoner of war seized by him, it is an infraction of the neutrality of the state strictly speaking, and it is bound to take reasonable steps to release the ship or the prisoner as the case may be, although a laxer practice in the case of ships prevails. And for these purposes, the territorial waters form part of the state territory. And it cannot be that a state has less powers to protect its own interest than those of a friend. It would, therefore, be entitled to arrest in such waters any person who is wanted by it for having transgressed the laws of the state, or, as in the present case, as being an escaped prisoner of war. In the case of these waters,

as in that of ports, there is an abstinence from the exercise, rather than an absence, of jurisdiction.

Briefly then, a state can arrest an escaped prisoner of war on board a foreign ship in its ports, according to the practice of Great Britain and the other states except France, since complete jurisdiction is exercised in such places. Even according to the distinctive view of France, such an arrest would be legal, as it is a matter affecting the interests of the state. For a similar reason, a state would, by the law of nations, be justified in making the arrest in its territorial waters.

I shall now give two instances in which the right in question has been exercised.

In what is known as the *Creole* case, Great Britain released a slave who was on board an American vessel in British waters. This gave rise to an emphatic protest from Webster on behalf of America, in the course of which he remarked—"The rule of law and the comity and practice of nations allow a merchant vessel coming into any open part of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country . . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive . . . But nevertheless, the law of nations as I have stated it, and the statutes of Governments founded on that law, as I have referred to them, show that enlightened nations in modern times do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbours, or wherever else they may be water borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof; and that to the extent of the exercise of this jurisdiction they are considered as parts of the territory of the nation itself." Notwithstanding this high-sounding exposition, Great Britain does not appear to have confessed herself in the wrong. Hall, p. 209 n (1).

The other instance occurred in the late Chino-Japanese war and is mentioned in Professor Takahashi's "International Law during the Chino-Japanese war." When the British steamer *Gaelic*

arrived in the harbour of Yokohama from San Francisco, the Japanese authorities searched it, as they had received an intimation from America that there were on board two Americans and one Chinaman who were proceeding to China for the purpose of selling to the Chinese Government some important secret inventions which they pretended to have made for the cheap and speedy destruction of the Japanese fleet. But it was found that the men had previously trans-shipped to the French steamer *Sydney* which had already set sail from the port. When the *Sydney*, however, called at the Japanese port of *Kobe*, it was searched by the Japanese authorities and the men were arrested. These acts on the part of the Japanese Government at first gave rise to some protests on the part of the Governments concerned, but eventually it seems to have been admitted that Japan was in the right. Professor Westlake discusses the matter in an Introduction written by him to the above book. He considers the objection taken by Britain to the search of the *Gaelic* on the ground that the immediate destination of the men was neutral and they could not therefore be treated as contraband on the strength of their ultimate destination. On this point he is of opinion that the doctrine of continuous voyages is not applicable to persons as it is to property and that the British contention on this point was sound. In fact, it seems to be open to serious question whether persons can at all be treated as contraband of war (Hall, Ch. VI, p. 708). However this may be, Westlake justifies the action of the Japanese on the true ground on which it can be supported—viz., the principle enunciated in this article—that a state has the right, in the exercise of its territorial sovereignty, to enter upon and search foreign vessels, in its ports or in its territorial waters, and seize any enemy found on board. In his own words “the *Gaelic* was not searched on the high seas but in the waters of the belligerent who searched her.” Passengers by her on their way to the enemy with proposals for destroying Japanese ships and means for giving effect to those proposals were self-constituted enemies, although their nationality was neutral. A state has the right to protect itself on its own soil and in its own waters against all enemies, whether they are such by their nationality or by their free choice, and it would be absurd to contend that any other state can make the nationality of its ships or of its subjects a ground for interfering with the exercise of that right.

If the ship be a ship of war, the matter assumes an entirely different aspect. Out of courtesy to the state owning it and whose sovereignty it is supposed to represent, it is held that no entry upon it for any purpose whatever, without the captain's consent, is permissible. Nor is the territorial jurisdiction exercised over acts done on board, save where the parties concerned are subjects of the territorial state, or an act done on board the vessel takes effect externally to her, or the State owning the vessel voluntarily submits to such jurisdiction. It would not be right on the part of the captain to harbour a criminal flying from the laws of his state, but it is recognized that in the case of political offences such shelter may be afforded, on the same principles as those on which extradition is not allowed for such offences. A similar right would exist in the case of a prisoner of war escaping and seeking shelter on board. In the case of fugitive slaves too, the instructions given to Commanding Officers of British men-of-war recognize the right to grant asylum to them from the pursuit of their masters in countries where slavery is recognized. Even in cases where the territorial jurisdiction exists, it ought not to be exercised by forcible entry on board, but by application to the captain and failing him to the Government of his country. It is clear, therefore, that the British authorities would have no reason to complain, even if a French ship of war, lying, say, in Colombo harbour, should afford shelter to a Boer prisoner escaping from the land; much less would they be entitled to demand a surrender when the man has come on board outside British waters. And as I have mentioned already, it would not be lawful to enter forcibly on board, even if the British Government should have a right to demand his surrender, which it has not.

M. A. TIRUNARAYANA CHARI.

HINDU AND MAHOMEDAN RELIGIOUS ENDOWMENTS.

II. *What is a Religious Endowment?*

We shall have next to consider what a religious endowment is and in what it consists. An endowment in its primary signification

is the creation of a perpetual provision out of lands or money for any institution or person. In a secondary and more general sense it is used to denote wealth applied to any person or use.—*Wharton's Law Lexicon*, p. 269. The term is also more technically used in England and is then applied to any provision for the officiating minister of the church, the provision consisting in the setting apart of a portion of lands for his maintenance. Thus in *Browne's Law Dictionary*, p. 200, it is said that "in ancient times the Lord of a manor, when he built a church on his demesne lands, usually endowed it with a piece of land called the *glebe*. But at the present day many endowments exist and for many very diverse objects, and may consist either in land or money or consols simply, which private individuals have given to trustees in trust for charity." In *Webster's Dictionary*, the term 'Endowment' is stated among others to mean "That which is bestowed or settled on a person or constitution; property, fund or revenue permanently appropriated to any object." This corresponds with the secondary signification stated above. According to this signification the word means wealth whether in the form of money, land or produce of land or any other moveable or immoveable property, set apart permanently as a provision for any object or purpose. This is apparently the meaning of the word as used in the term 'Religious Endowment' occurring in Act XX of 1863 and in Regulations XIX of 1810 (Bengal) and VII of 1817 (Madras). Religious endowments must, therefore, mean wealth set apart permanently for a religious purpose, *e. g.*, a religious establishment, foundation, or institution.

We shall next proceed to consider, what is meant by a religious establishment, foundation or institution, as these words are used in the aforesaid Act and Regulations and occur so frequently in Indian cases on this subject. "*Religious Foundation*" has, among others, two meanings: (1) A donation or legacy appropriated to support a charitable institution. In this sense the word is synonymous with the term "Religious Endowments" in its secondary sense. But this is not the meaning of the word as used in the context we are now considering. (2) That which is founded or established by endowment. "*Establishment*" has also various meanings. In the *Century Dictionary* we find the meaning of this term is given to be "That which has been

established or set up for any purpose." This corresponds with the 2nd meaning of "foundation" as given above. Another meaning that is given in the same book is "The authoritative recognition by a state of a church, as the national church; hence, also, the religious body thus recognized by the state, and maintained and more or less supported as the State church." The church is accepted in England by the State as the religious body which is the legitimate possessor of all property set apart for religious uses. But in India there is no State church and hence though a religious establishment in India is regarded under certain circumstances as a fictitious but legal entity, there is no use in considering this aspect of the term. An "*institution*" is said to be in the Century Dictionary "an establishment for the promotion of some object; an organized society or body of persons, usually, with a fixed place of assemblage and operation, devoted to a special pursuit or purpose."

Thus it will be seen that these 3 terms have among their various meanings one common signification. In that sense they are synonymous and must be taken to be "that which is established by an endowment for a religious purpose." It is in this sense that we find these terms used in the Act and the Regulations aforesaid. The distinction between a religious endowment and a religious establishment, foundation, or institution should be carefully borne in mind. A religious endowment is wealth set apart permanently for a religious purpose, *i. e.*, a religious establishment. A religious establishment, foundation or institution is that for which a religious endowment is founded, constituted or established.

In every society, that is certainly not atheistic, there must always exist religious institutions to which endowments must necessarily attach for their maintenance and support. In India, where people of various nationalities, tribes, sects, and sub-sects exist side by side under one common rule, these religious institutions are to be found in a greater degree than elsewhere. Religious institutions, establishments or foundations as well as the endowments if any attached thereto are in India chiefly two : (a) Hindu, and (b) Mahomedan. We exclude, of course, those of the Christians. See *Krishnaray Ganesh v. Rangray*, 4 B. H. C. A. C. J. p. 1 at p. 7 and *Narayan v. Chintamani*, I. L. R., 5 B. 393 at p. 396.

The term, Hindu, is rather vague and indefinite though it is frequently used. It would not have been absolutely necessary to discuss the various applications of the term, and there could have been no objection in simply saying that we would use the term in a particular sense, but for the fact that the term is to be found in the Act and the Regulations already adverted to. It is therefore necessary to see in what sense the term is used in that Act and those Regulations.

1st—Etymologically it means an inhabitant of India.

2nd—A person who is a Hindu not by birth merely but by religion also (*vide Abraham v. Abraham*, 9 M. I. A., p. 199, where the Judicial Committee held that when the Civil Courts Regulation III of 1802, Madras, provided that the Hindu Law should govern the Hindus and the Mahomedan Law the Mahomedans, it was intended that Hindus and Mahomedans should respectively, be Hindus and Mahomedans not by birth merely but by religion also.)

3rd—It is used to denote a person who is governed by Hindu Law.

These are not, however, the meanings in which the term is apparently used in the Religious Endowments Act and the older Regulations. In order to arrive at a correct signification of the term, we may adopt the division into 3 classes of the population of India given by Dr. Banerjee in his book on "Marriage and Stridhan" for another purpose (*i. e.*, for finding out who is governed by Hindu Law).

First :—The descendants of the aboriginal tribes who have more or less avoided complete conversion to the Brahminical religion ;

Second :—The descendants of the early Aryan settlers and of such aboriginal races as have been completely absorbed in the Aryan community ;

Third :—Modern settlers of various religious persuasions, such as Mahomedans, Christians and Parsis.

The *first* class, according to Dr. Banerjee, comprises "considerable portions of the population of the Madras Presidency and Central India (the Jats) and the hill tribes of various other

parts of India. Their customs and their religion differ widely from those of the Hindus properly so called. They have no Codes of Law, but in some instances they have adopted much that is Hindu in their customs and religion, and some of these tribes, such as the Koch and others, have been described by Dalton as the Hinduised aborigines of India." Dr. Banerjee then contends that "these races ought not to be held to be governed by Hindu Law," and it may be so. But for our present purpose, it is enough to say that these *semi-Hindu races* have been sometimes regarded as Hindus. Though this class may not be governed by Hindu Law as contended by Dr. Banerjee, yet there are many among them who call themselves Hindus. Their title to be called Hindus has never been denied though they may not be governed by Hindu Law. Thus it appears from the Census Report of the North-West Provinces, 1891, that, "Hinduism includes a fluctuating mass of beliefs, opinions, usages and observances, social and religious ideas, the exact details of which it is impossible to reduce to anything like order, and in the most aspects of which it is impossible to recognise anything that is common. A belief in the religious superiority of Brahmans, veneration for the cow and respect for the distribution of castes are the elements of Hinduism, which are most generally recognised as fundamental. But each and all of these has been rejected, or is rejected by tribes, castes or sects whose title to be included amongst Hindus is not denied." It will, therefore, be seen that this class comes under the term 'Hindu' and their religious endowments must also be classed as 'Hindu' and come within the purview of the Religious Endowments Act and the Regulations.

As regards the *second class*, viz., the descendants of the early Aryan settlers and of such aboriginal races as have been completely absorbed in the Aryan community, there can be no doubt that the members comprised under this class come within our purview and are 'Hindus.' They are not merely 'Hindus' but are also governed by Hindu Law. The Buddhists, Jains, Sikhs and Brahmos come under this class. The religious endowments of this class fall within the purview of the Act and the Regulations. In *Dhurrum Singh v. Kissen Singh*, I. L. R. 7, 767, it was held that a Sikh religious institution came within the purview of the Religious Endowments Act. In *Thackersey Dewraj v. Hurbhum Narsey*, I. L. R. 8 B. 432, a Jain religious institution was in question.

As regards the *third* division we have the following :—

(1). *Christians* :—These are not within our province. Their religious institutions are thought not to fall under Act XX of 1863 or the earlier Regulations.

(2). *Parsis* :—These cannot be said to be Mahomedans in the strict sense of the term, but it cannot be said that their religious institutions do not fall under Act XX of 1863 or the old Regulations VII of 1817 and XIX of 1810. Their religious institutions may be considered under the heading of “Mahomedan” though separately.

(3). *Mahomedans* :—This is sufficiently descriptive.

A Hindu religious endowment is ordinarily a grant to an idol, *vide Anandathiritha Acharyar v. Nagamutha Ambalagaran*, I. L. R., 4 M. 200, and is either *Devasthan* or *Sevasthan*, while a Mahomedan religious endowment which is known in Mahomedan Law as *wakf*, is either a Mosque, Durga, or Khankah, &c. (*Narayan v. Chintamani*, 5 Bom. p. 393 at 396). Hindu religious institutions are usually temples, mutts, &c. According to Hindu Law an idol (*vide Syed Shah Ahmed v. Mussamut Bibee Musebun*, 21 W. R. p. 415) or, for the matter of that, any religious foundation is a juridical subject or person capable of holding and enjoying property. An idol is a *caput mortuum* (*Kumara Asima Krishna Deb v. Kumara Krishna Deb*, 2 B. L. R., O. C. J. p. 1 at p. 7). It is only in an ideal sense that property can belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as Shebait, or Manager (*Vide Prosunno Kumari Debya v. Golab Chand Baboo*, L. R. 2, I. A. p. 145 at p. 152) and property dedicated to the idol is *res extra commercium*. In *Thackersey Dewraj v. Hurbhum Nursey*, I. L. R. 8 B., p. 432, Scott, J., observed at p. 456, “In short the deity of the temple is considered in Hindu Law as a sacred entity or an ideal personality possessing proprietary rights.” In the leading case of *Manohar Ganesh Tambekar v. Lakhmiram Govindram*, I. L. R. 12 B. 247 (the *Rachhod Devasthan* case), West, J., observed at page 264, “The Hindu Law recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical subjects or persons called foundations.” So in *Nilmoney Sing v. Jagabonda Roy*, I. L. R.,

23 C. 536, the Calcutta High Court observed that "the idol is a juridical person capable of holding property." On the same principle it was held in *Shri Ganesh Dharnidhar Maharajdev v. Keshavrao Govind Kulgavkur*, I. L. R., 15 B., p. 625, familiarly known as the Chinchavad Savasthan case, that the idol was a fictitious legal entity owning property.

When once property is devoted to the service of an idol, the donor cannot revoke the gift. It cannot be alienated save in the interests of the idol. *Vide Collector of Tannah v. Hari Seetaram*, I. L. R., 6 B. 546, and *Thackersey Dewraj v. Hurbhum Nursey*, I. L. R., 8 B. p. 432 at 453 and 456. The Shebait has no legal property in the same but has only the title of Manager of a religious endowment (*Vide, Maharanes Shibesourie Debia v. Mothooranath Acharjo*, 13 M. I. A., p. 270, S. C. 13, W. R. P. C. 18, *Prosunno Kumari Debya v. Golab Chand Baboo*, L. R. 2, I. A. 145, S. C. 14, B. L. R. 450 and *Thackersey Dewraj v. Harbam Nursey*, I. L. R., 8 B. 432 at p. 456.)

Grants of inams for religious or charitable purposes are frequently found to be of great antiquity, and evidenced by inscriptions on copper plates. They were granted by former sovereigns (*Krishnarao Ganesh v. Rang Rao*, 4 B. H. C. p. 1 at p. 7). A royal grant for Hindu religious purposes is never temporary. It is perpetual and irresumable. No act on the part of the Hindu prince or sovereign would have been more disgraceful than the resumption of such a grant. A religious penalty is also attached to such resumption under Hindu Law (*Collector of Tannah v. Hari Seetaram*, I. L. R., 6 B. 546 (F. 3.))

We shall discuss the history of mutts and other religious institutions and the right of Shebaites, &c., in a later chapter.

The nature of a mosque is also similar in Mahomedan Law.

"Wakf" in its principal sense means detention (Hamilton's Hedaya, Vol. II, p. 384, Ch. XV—Wakf; *Jewan Dass Sahoo v. Shah Kubeer-Ood-Deen*, 2 M. I. A. p. 390, and *Abdul Ganne Kasam v. Hussien Miya Rahimtulla*, 10 B. H. C. p. 7).

There are 2 views taken with reference to the nature of a Wakf. According to Haneefa a Wakf "in the language of the law signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue and the

advantage of it go to some charitable purpose in the manner of a loan." (*Jewan Dass v. Shah Kubeer-Ood-Deen supra*). According to the two disciples "Wakf" signifies "the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of god, by the advantage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute, though differing in this that *Abou Yoosuf* holds the appropriation to be absolute from the moment of its execution, whereas *Mahomed* holds it to be absolute only on the delivery of it to a Muttawalle, and consequently that it cannot be disposed of by gift or sale and that inheritance also does not obtain with respect to it." (*Jewan Dass v. Shah Kubeer Ood Deen supra*).

Wakf is a bequest or gift for religious or charitable purposes, or an appropriation of a pious or charitable nature, to wit, the service of God in such a way that it may be beneficial to men. (*Abdulganne Kasam v. Hussien Miya Rahimtula supra*). The primary objects for which lands may be endowed under Mahomedan Law are to support a mosque and to defray the expenses of the worship conducted in that mosque (*Muzharool Hug v. Puhraj Ditarey Mohapattur* (1870), 13 W. R. (C. R., 235).)

In *Jivahra v. Akbar Hussain*, I. L. R., 7 A. 178, a Full Bench of the Allahabad High Court had to consider the nature of a mosque. Petheram, C. J., observed in that case that, "according to Mahomedan custom, the property in a mosque and in the land connected with it is vested in no one, and is not the subject of human ownership, but all the members of the Mahomedan community are entitled to use it for purposes of devotion whenever the mosque is open." Mahmood, J., observed in the same case that it is the rule of "Mahomedan law that when any person has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, &c., an endowment is immediately constituted; his act deprives him of all the ownership in the property and vests in God in such a manner as subjects it to the rules of divine property, when the appropriator's right in it is extinguished and it becomes the property of God by the advantage of it resulting to his creatures."

According to the Mahomedan Law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of Sunni Mahomedans. It is a place where all Mahomedans are entitled to go and perform their devotions as of right according to their conscience. No one sect or portion of the Mahomedan community can restrain any other from the exercise of this right. It was therefore held by a Full Bench of the Allahabad High Court (*Ataul-lah v. Azimullah*, I. L. R. (1889) 12 All. 494) that members of the Muhammadi or Wahabi sect are Mahomedans and as such are entitled to perform their devotions in a mosque, though they may defer from the majority of Sunni Mahomedans in respect of particular points of ritual.

This, however, will, be the case only where the mosque is a public one when it is open to all Mahomedans without distinction of sex, and a Mahomedan pronouncing the word 'Amen' in a loud tone according to the tenets of his sect in the *bona-fide* exercise of his religious devotion does nothing contrary to the Mahomedan ecclesiastical law and does not commit any offence or actionable wrong. (*Jangu v. Ahmedullah* (1889), I. L. R. 13 All. 419). "It is a fundamental principle of Mahomedan Law that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God to use the language of the Hedaya 'in such manner as subjects it to the rules of divine property .. ", A mosque once so consecrated cannot in any case revert to the founder and every Mahomedan has a legal right to enter and perform devotions according to his own tenets so long as the form of worship is in accord with recognised rules of Mahomedan ecclesiastical law (Per Mahmood, J., in *Jangu v. Ahmedullah supra*, *Doyul Chund Mullick v. Syed Keramat Ali* (1871), 16 W. R. C. R. 116 and *Fatma Bibi v. The Advocate-General of Bombay*, I. L. R. 6 B. 42).

A mosque when public is not the property of a particular individual or even a body or corporation or any other human organisation which in law has a personality. In the eye of the Mahomedan Law, a mosque is the property of God and must be regarded as such.

There may be a valid disposition as *Wakf* without the use of the word *Wakf*. If the intention of the donor was to constitute a

Wakf and the document can be so construed, the absence of the word *Wakf* is immaterial [*Jewan Dass Sahoo v. Shih Kubeer-Ood-Deen* (1841), 2 M. I. A. p. 390, S. C. 6 W. R. (P. C.) 3]. So the mere use of the word *Wakf* is not conclusive. The mere fact that the word *Wakf* is used in a grant without there being a destination of the property to religious and charitable uses does not constitute a valid *Wakf* (*Abdulganne Kasam v. Hussen Miya Rahimtulla* (1873), 10 B. H. C. p. 7).

A *Wazifa* grant may be a religious endowment, such is neither necessarily nor generally its nature. *Marifa* is the same as *Wazifa* (*Sayad Mahomed Ali v. Sayad Gobar Ali*, I. L. R., 6 B. 88).

An appropriation of property for the expenses of the repairs of mosques, wages of the muzzin, expenses of the 2. Eeds and lighting and taking care of fakirs and travellers is a *Wakf* and is an endowment for religious and charitable purposes or uses (*Sheik Abdool Khalel v. Poram Bibee* (1876), 25 W. R. C. R. 542).

We shall discuss about the objects which can properly constitute a valid *Wakf* and the origin and nature of durgas or *khan-kahs*, &c., later on.

NOTES OF INDIAN CASES.

Pareesh Nuth Singha v. Nabogopal Chattopadhyaya, I. L. R., 29 C. 1. There was a decree under the Bengal Tenancy Act for arrears of rent. A sale in execution of the decree would have the effect of annulling prior mortgages. Nothing can, therefore, be said against the view of the majority of the judges constituting the Full Bench in holding that a mortgagee has, under such circumstances, a right to apply under S. 310-A of the C. P. C., to set aside a sale held under such decree as being a "person whose immoveable property has been sold." A mortgage interest is an *interest in immoveable property* and is *immoveable property* within the definition of the General Clauses Act and this is the meaning to be given to the term *immoveable property* in the Civil Procedure Code. Where, however, the sale has not the effect of annulling prior encumbrances (a decree for rent in Madras will not annul prior

encumbrances) the mortgagee's position is not jeopardised by such sale and his interest will not be affected. He will not, therefore, be entitled to apply under S. 310-A.

• According to Banerji, J., the nature of the execution sale must be looked at to see whether a mortgagee is, in any given case, entitled to apply under the section. The words of the section seem to bear out his view. But if this test is to be literally applied, it will enable a person to apply under this section if his property is, as a matter of fact, sold even though the sale cannot affect him in law as when he is a stranger to the decree and not bound by it. It will further necessitate an enquiry into adverse claims of ownership. It is very doubtful whether the legislature contemplated any such enquiry under this section. According to Amir Ali, J., every person who has an interest in immoveable property—be it qualified, partial or absolute—is entitled to apply under this section. It may well be doubted, however, whether a reversioner has such an interest in the property as will entitle him to apply under the section.

Bhiku v. Shujat Ali, I. L. R., 29 C. 25. We are far from satisfied as to the correctness of the decision in this case on the construction of Art. 11 of the Limitation Act. A purchaser in court auction takes possession of the property sold. Some persons, claiming to be in possession as Zuripeshgidars under a Zuripeshgi lease executed, prior to the sale by the judgment debtor under the decree in execution of which the sale has taken place, apply under S. 335, C. P. C., to be placed in possession. They fail (the grounds of the order do not appear) and bring a suit ten years after such order for recovery of the debt due under the Zuripeshgi lease by sale of the property comprised thereunder. If the title under the Zuripeshgi is completely negatived in the prior proceedings under S. 335, it seems to us not very clear why Art. 11 should not apply to the 2nd suit which is only brought to enforce a right under the Zuripeshgi. The learned judges, however, held in this case that a suit for sale of mortgaged property is not a suit to establish a right to the property within the meaning of Art. 11 of the Limitation Act but only a suit to recover a debt by enforce-

ment of the charge. We are not, however, much impressed with the distinction that is sought to be made, nor are we satisfied as to the soundness of the interpretation placed on Art. 11. A suit for sale is a suit for "the determination of any other right to, or interest in, immoveable property" within the meaning of section 17 of the C. P. C. A mortgagee suing for sale can hardly be said not to sue for establishing his right to the immoveable property within the meaning of Art. 11.

Ganoda Prasad Roy v. Shib Narain Mukerjee, I. L. R., 29 C. 33. In this case the Calcutta High Court has held that the representative of a deceased defendant against whom an *ex parte* decree has been made is a person entitled to apply under S. 108, C. P. C. for setting aside the *ex parte* decree. Though the question is not altogether free from difficulty by reason of the loose language employed in the code (*cf.* definition of 'judgment debtor' in the interpretation clause) the view taken by the Calcutta High Court is more reasonable than the contrary view of the Allahabad High Court in I. L. R., 21 A. 274, which is dissented from by the Calcutta High Court (*vide* also our remarks in 9 M. L. J. 285). It may be pointed out that in the new Civil Procedure Bill an amendment of the section is proposed which has the effect of reproducing the rule laid down in the Calcutta case.

Rameswar Prosad Singh v. Rai Sham Kishen, I. L. R., 29 C. 43. The first point considered by the learned judges in this case seems to require further consideration. A creditor takes a bond for a certain amount and appropriates part of it for his own commission and *nazarna* and pays only the balance. The question raised is whether there is not failure of consideration to that extent. If the case were one to be considered under the provisions of the recent amendment to the Contract Act (Act VI of 1899), there can be no difficulty in holding that the creditor will not be entitled to claim the whole amount stated in the bond under the circumstances alleged. A creditor appropriating a certain sum for commission stated to be due to himself for advancing the loan and for *nazarna* and paying only a less sum can hardly be said not to have taken undue advantage of the circumstances of the debtor.

It may of course be different where commission is agreed to be given to the go-between who procures the loan for the debtor and the creditor deducts such sum from the amount of the bond for being paid over to such person or where the creditor deducts interest in advance. Even before the amendment, however, we do not see why the case should not be treated as one of failure of consideration as regards the amounts appropriated by the creditor himself for his commission and *nazarna* though it may have been acquiesced in by the debtor at the time of loan. If it is taken to be a gift to the creditor in consideration of his advancing a sum and helping the debtor the transaction has to be jealously scrutinised so that if there is the least trace of undue influence or if undue advantage taken of the position of the debtor, the transaction will be set aside.

The Secretary of State for Foreign Affairs v. Charlesworth Pilling and Co., I. L. R. 26 B. 1: Many questions and some of them of interest to the student of International Law have been decided by the Judicial Committee in this case.* The 1st point decided by the—is that the grant by treaty of extra Judicial Committee territoriality on British subjects in a foreign place (Zanzibar) does not constitute any land acquired by such British subjects in such foreign territory as British land so as to prevent the application of the law of the *situs*. The fiction denoted by the term ought not to be extended further than might be necessary for the objects for which the special privileges were granted by the treaty. A further point decided in this case is that where one foreign state is given power and jurisdiction in another independent state to appoint its own officers to administer justice with reference to persons resident in the latter state, but domiciled in the former state, such judges or officers are only acting as judges or officers of the foreign state which has delegated the power and not as officers of the state to which the power is delegated and as such they are bound to take judicial notice of the law of the latter state. Another point decided by the Judicial Committee is that the only questions to be tried in a case are the

* It is noteworthy that, on the eve of his retirement, Lord Hobhouse has written several judgments which in grasp of principle and felicity of expression remind the reader of the early judgments of the Privy Council reported by Moore.

issues in the cause and that the conduct of the presiding judge has no bearing upon them except as it is directly relevant to the question which the court of appeal has to try, viz., whether or no his award or judgment is valid. This seems to be a very elementary proposition of law but courts exercising appellate authority do not sometimes keep this steadily in view. The fact that the judge is bribed into giving a decree for plaintiff does not of itself show that the merits are not with the plaintiff but with the defendant.

SUMMARY OF RECENT CASES.

Will—Devise—Executory devise—Perpetuity—Remoteness—Gift over—Complex event—Splitting of event—Absolute estate—Limitations invalid.

Hancock v. Watson [1902], A. C. 14 H. L. (E).

A gift void for remoteness does not cease to be void because in the events which actually happened the gift could vest within the time limited by the law of perpetuities.

Where there is a gift over in the event of a prior gift failing, and it was void because the prior gift itself was void for remoteness, the failure of the prior gift cannot be split into separate events so as to validate the gift over in some events while conceding that it would be invalid in other events.

Where the gift was in trust to S. D. for life and after her death in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or on marriage if daughters, but *in default of such issue*, to be divided among the children of C payable to sons at twenty-five or to daughters at twenty-one or marriage and S. D. died without issue.

Held, that the gift over on the death of S. D. was wholly void, that the contingency indicated by the words *in default of such issue* could not be split into separate contingencies, some of which were good and some bad and that the gift in favour of the children of C. did not take effect, though if the instrument had provided for a gift over to the children of C on the death of S. D. without issue, there would be nothing illegal in the gift.

Held also that where there is an absolute gift to a legatee and trusts are engrafted upon that absolute interest, which fail either from lapse or invalidity or for any other reason, the failure augments the interest of the donee; it does not benefit the residuary legatee or the next-of-kin.

Mortgage—Redemption—Clog—Public-house—Covenant by mortgagor to take beer during term from mortgagee only.

Noakes & Co. v. Rice [1902], A. C. 24 H. L. (E).

A certain licensed victualler having mortgaged his leasehold public-house to certain brewers agreed with them not to use or sell in the house, during the continuance of the term and *whether any money was or was not due upon the mortgage*, any malt liquors except those purchased of the mortgagees.

Held, that the covenant was a clog on the equity of redemption and ceased to be operative on payment of all moneys due upon the mortgage security. The correctness of the decision in *Santley v. Wilde* [1899] 2 Ch. 474 was doubted on the facts by their Lordships *Macnaghten* and *Davey*.

Trust—Charity—Uncertainty—Such charitable or public purpose as my trustee thinks proper.

Blair v. Duncan [1902], A. C. 37 H. L. (Sc).

A bequest to such charitable purpose as a certain person thinks proper is good and enforceable by law. A bequest to such public purpose as my trustee thinks proper is void for indefiniteness, because a public purpose is not considered as definite by law while a charitable purpose is considered to be so. A bequest to such charitable and public purpose as the trustee thinks proper is good, because the gift will be for a charitable purpose of a public nature. But where the bequest is to such charitable or public purpose as the trustee shall name is bad, because the clause authorizes the trustee to apply the moneys to a public though not charitable purpose and such a clause would be inoperative for uncertainty.

Company—Powers—Reserve Fund—Purchase and sale to Company by Director—Court—Jurisdiction—Action—Constructive trust.

Burland v. Earle [1902], A. C. 88 P. C.

It is an elementary principle of law relating to companies that the court will not interfere with the internal management of companies acting within their powers and in fact have no jurisdiction to do so.

In order to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. See *Foss v. Harbottle*, 2 Hare 461 and *Mozley v. Alston*, 1 Ph., 790.

An exception to the above rule is made in a case where the minority of shareholders in a company claim the relief against the majority and the majority will not permit an action to be brought in the name of the company but such actions are confined to cases where the acts of the majority complained of are of a fraudulent character or *ultra vires* of the company. See for example *Menier Viteooper's Telegraph Works*, L. R. 9 Ch., 350.

In the absence of a provision to the contrary in the regulations of a company, a shareholder is not debarred from voting by reason of his having a particular interest in the subject matter of the vote, See *N. W. Transportation Co., Ltd. v. Beatty*, 12 A. C., 589.

• There is no principle of law that requires a going company to divide the whole of its profits among its shareholders. It may reserve the whole or any part of its profits in its discretion with which the Courts have no power to interfere. The profits so reserved may be invested in any securities approved by the directors subject to the control of the general body of shareholders and they are not compelled to accept only such securities as trustees are permitted to accept. It is not *ultra vires* of the company to invest the funds in the name of a sole trustee though it may be imprudent and undesirable. He is no doubt accountable; but the dissentient shareholders cannot obtain an injunction restraining the directors or the sole trustee from dealing with the profits or in any wise investing them.

Where a director purchased property for himself and afterwards sold it to the company at a profit, it was held that, whether or not the company was entitled to rescind the contract, it cannot retain the property and claim the profit made by the director. See *Erlanger v. New Sembrero Phosphate Co.*, 3 A. C. 1218.

Covenant not to assign without lessor's consent—Injunction.

McEacharn v. Colton [1902] A. C. 104, P. C.

A covenant not to assign a lease without the consent of the lessor runs with the land and the consent of the lessor is required even in the case of a re-assignment to the original lessee. An injunction can be granted on the lessee threatening to assign the lease without lessor's consent. *Doherty v. Allman* 3 A. C. 709 held applicable.

Special leave to appeal—Martial law—Civil tribunals.

D. F. Marais *Ex parte* [1902] A. C. 109, P. C.

Where actual war is raging, acts done by the military authorities are not justifiable by the ordinary tribunals.

The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging.

Leave to appeal refused from a judgment pronouncing the custody of the petitioner by the military authorities lawful in a district where martial law prevails.

JOTTINGS AND CUTTINGS.

Registration of decrees.—It is said that a creditor's troubles begin only after he has obtained a decree. Among these troubles are the difficulties caused by the law of limitation. It is strange, however, that suitors and practitioners should be ignorant of the provision in the 2nd column of Art. 179 of the Limitation Act, that where a certified copy of a decree or order has been registered the period of limitation is six years instead of three. The registration of a decree or order involves only a trifling expense, while the advantages secured are great. Practitioners owe a duty to their

clients to impress upon them the necessity of registering a certified copy of a decree or order. The failure to realise this duty has deprived decree holders of the fruits of many a hard won decree.

* *

Suretyship—Statute of limitation—Effect of discharge of principal:—The defendant having mortgaged his property sold it to one who promised to pay the mortgage debt. The court found that the mortgagee accepted him as her debtor so that she became bound by the relation of suretyship existing between the mortgagor and the buyer. The statute of limitations ran against the mortgagee's claim as to the buyer, but the mortgagor had been out of the state, so that the statute had not run in his favour. *Held*, that as the mortgagor was the surety of the buyer, the creditor's right against him is barred also. *Mulvane v. Sedgley*, 64 Pac. Rep. 1038 (Kan).

As in the ordinary contract of suretyship, the promise of the surety to pay was conditioned on no act of the creditor. *Cf. Campbell v. Sherman* 151 Pa. St. 70. In order to hold a surety, the creditor need not first sue the principal, for mere indulgence to the principal does not discharge the surety, though he is injured thereby. *Hunt v. Bridgham*, 2 Pick. (Mass). 581. As is well known the statute of limitations does not destroy the obligation of a contract, but merely bars the remedy *Cf. Grovenor v. Signor*, 88 N. W. Rep. 278. It is not easy, therefore, to find a ground on which to support the principal case. The surety could have protected himself by bringing a bill in equity to compel the principle to pay. *Bishop v. Day*, 13 Vt. 81. He may also, if required to pay the obligation himself, sue the principal for indemnity, and since this right of action arises only on payment, it is not barred by the running of the statute in favour of the principal as to the original debt. *Thayer v. Daniel*, 110 Mass. 345. It is established that if a creditor fails to bring an action against the administrator of a deceased debtor within the time of the special statute applicable in such cases, the surety is not discharged. *Minter v. Branch Bank, etc.*, 23 Ala. 762. It seems that in the principal case equally the surety should be held liable. Such was the decision in *Whiting v. Clarke*, 17 Cal. 407; *contra Auchampaugh v. Schmidt*, 70 Ia. 642. —*Harvard Law Review*

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Property—Statute of limitations—Accrual of action on covenant of warranty.—The defendant in 1886 conveyed to the plaintiff with covenant of warranty land then possessed, under contract of purchase, by a third person, who in September 1890 obtained a decree for a conveyance. *Held*, that an action on the covenant of warranty, brought in August 1895, is not barred by a five year statute of limitations. *Watson v. Heyn*, 86 N. W. Rep. 1064 (Neb.)

Covenants of warranty are generally treated as co-extensive with covenants for quiet enjoyment. See Raw., Cov., 5th Ed., §14. These two covenants have at least the common characteristic that in general they remain unbroken till eviction by a paramount owner. *Réal v. Hollister*, 20 Neb. 112; *Howard v. Maitland*, 11 Q. B. D. 695. If, however, when the land is conveyed, the paramount owner already has possession, a breach occurs immediately. *Isley v. Wilson*, 42 W. Va. 757, 772; *Shattuck v. Lamb*, 65 N. Y. 499; See Raw., Cov., 5th Ed., §139. In the principal case the paramount owner, though his right was at first purely equitable, was always entitled to the possession which he held. Therefore, under the principle apparently governing the authorities, that these covenants are broken when the covenantee is excluded from possession by one having a paramount right, and then only, it follows that when the defendant's deed was delivered, his covenant was broken and the statute began running. A former opinion by the Nebraska court adopts such a view. See *Heyn v. Ohman*, 42 Neb. 693. The present decision, that a second breach occurred when the decree divested the title, is opposed to the established principle of such cases as *Real v. Hollister*, *supra*.

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Persons—Mortgage by infants—Avoidance.—The plaintiff, while an infant obtained advances from a building society, to purchase a piece of land and to erect houses thereon. The land was conveyed to the infant by the vendor and the next day mortgaged to the society to secure the advances. On learning of the plaintiff's infancy, the society took possession of the property. When the plaintiff attained her majority, she repudiated the contract and mortgage and brought action for possession. *Held*, that the mortgage is void; yet, since but for the advance of the purchase money

the vendor would have had a vendor's lien, the society can to the extent of the purchase money stand in the vendor's shoes. *Thurstan v. Nottingham, etc., society*, [1902] 1 Ch. 1 (C. A.).

The lower court held that the plaintiff could not repudiate the mortgage, and affirm the conveyance, on the satisfactory ground that they were one transaction. See comment in 14 Har L. Rev. 388. The Court of appeal, though recognising the hardship on the society, felt able to protect it only so far as could be done on the doubtful theory of vendor's lien. It would seem that the court might, on sound legal principle, have protected the society to the full extent of its advances. When an infant on coming of age, disaffirms a contract, he is bound to restore whatever of the consideration still remains in his hands. *Badger v. Phinney*, 15 Mass. 359. If he no longer has the consideration *in specie*, such of his property as can be identified as the direct proceeds of the consideration is liable to the other party's claim. *Mac Greal v. Taylor*, 167 U. S. 688. On this view, though it be admitted that the mortgage is void, the plaintiff would, unless willing to perform the contract, hold land and buildings the proceeds of the advances, subject to a constructive trust for the society. Cf. *Dyer v. Jacoway*, 42 Ark. 186.

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Criminal law—Lawful act resulting in unlawful acts by others:—The appellant, a Protestant lecturer, was in the habit of holding meetings in the streets of Liverpool, at which he spoke in highly insulting, though lawful language of the Catholic religion. As a result there were frequent breaches of the peace by Catholics among his hearers. He intended to continue the meetings. Held, that he was properly put under recognizance to be of good behaviour. *Wise v. Dunning*, 18 T. L. R. 85 (Eng. K. B.).

Cases of this class raise the interesting question whether an act lawful in itself becomes unlawful if a breach of the peace by others results from the doing of it. It seems clear on principle that it can be punishable criminally only if the actor has the *mens rea*; that is, if he intends an unlawful result, or, if he is guilty of culpable negligence. Cf. *Beatty v. Gillbanks*, 9 Q. B. D., 308. In the principal case it is admitted that the appellant did not intend to induce a riot. In order to find negligence, it is necessary to find that

he was under a duty to use care. It is submitted that so long as a man's acts are lawful, and he does not intend to induce others to act unlawfully, there is no duty upon him to guard against the unlawful acts others may choose to commit. *Cf. State v. Evans*, 124 Mo. 397. The case seems not fairly distinguishable from *Beatty v. Gillbanks*, *supra*. The view of the Court would result in placing a burdensome restriction on the right of free speech, and personal liberty in general—*Harvard Law Review*.

* * *

Intent as affected by drunkenness:—It is to be regretted that the law with regard to civil suits in which the question of drunkenness arises has been left in a form far more indefinite than that of the Criminal law. In the latter branch of the law, the rule is well established that intoxication, though no defence, may be given in evidence to show the lack of specific intent. Though the general trend of civil decisions is in accord with this doctrine, that an act of a drunkard is still his voluntary act, there are several cases which tend to obliterate the distinction. In a recent suit on an insurance policy, under which the insurer was relieved of liability for intentional injuries, the insured had his thumb bitten by a drunken man. Although the court held that the facts showed an intentional injury, it was indicated that one may become so intoxicated as to be incapable of having an intention. *Northwestern Benevolent Society v. Dudley*, 61 N. E. Rep. 207. Opposed to this dictum is a decision in a calendar suit where evidence of the defendant's drunkenness was held inadmissible. *Mix v. McCoy*, 22 Mo. Ap. 488. The latter case is undoubtedly the sound one, as the offence—voluntarily uttering the words—was committed irrespective of malice or of any particular state of mind. The distinction accepted by the criminal law, that a drunkard's act, though voluntary, may be unaccompanied by any particular state of mind, seems now to be gradually being adopted in both tort and contract cases. According to the text writers, both at law, and in equity to-day a contract made by one utterly deprived of the use of his reason by drunkenness or otherwise is generally considered void, either on grounds of policy, *Markby, Elements of Law*, 5th Ed. § 754; or because there can be no deliberated intention to assent. *Story, Ep. Juris*, § 231; *Bishop Non-Contract Law*, § 513; *Pothier Traite Des Obligat*; § 49. The modern English cases are in accord with this

view. *Pitt v. Smith*, 3 Camp; 33; *Gore v. Givson*, 18 M. & W. 623. But Pollock, C. B., in a later case has intimated that under no conditions is the contract absolutely void. *Mathews v. Baxter*, L. R. 8 Ex. 132. This shows a tendency to revive the harsher early English doctrines. 4 Bl. Com. 26. In the United States, although the authorities are in hopeless conflict, the general tendency is to consider the contract as void. This view seems correct on principle, as there can be no contract if one party, through drunkenness or any other cause, is incapable of giving assent.

In equity, and now at common law since the introduction of equitable defences, contracts made while merely under the influence of liquor are voidable, but only if the other party has obtained an unfair advantage or has purposely caused the intoxication *Cooke v. Clayworth*, 18 ves 12; *Crane v. Conklin*, 1 N. J. Eq. 346. With regard to testamentary capacity a sound doctrine has been established. Intoxication at the time of making a will does not invalidate it if the testator comprehended the nature of the act. *Bannister v. Jackson*, 45 N. J. Eq. 702; *Key v. Holloway*, 7 Baxter (Tenn) 575. Where a testator destroys his will, either when while suffering from delirium tremens or merely under the influence of liquor it is held to be not revoked. *Brunt v. Brunt*, L. R. 3 P. & D. 37; *In the Goods of George Brassington*, deceased, 18 T. L. Rep. 15. These decisions are clearly correct as a valid revocation requires an *animus revocandi*.

It seems impossible, after a review of the authorities to deduce any broad principle with which all the cases where the effect of intoxication upon intent is in issue may be reconciled. The true rule in contracts and torts as well as in criminal law seems to be that if a specific intent or a special state of mind is necessary for liability, evidence of drunkenness is admissible to negative it, otherwise not. The *dictum* in the principal case is too sweeping, apparently recognising no distinction between an act intentionally, that is voluntarily, done and an act done with specific intent, that is an intention ulterior to the mere moving of the muscles.

—*Harvard Law Review*.

Judicial Restraints upon Trade Competition:—A decision of the Supreme Court of Alabama is instructive in its relation

to the question of unfair competition. The plaintiff, a water company, filed a bill against the City of Mobile, a corporation operating a system of water-works and sewers for itself and its inhabitants. The bill alleged that the defendant unjustly discriminated against the patrons of the plaintiff by charging them the same price for sewerage service alone, that it charged the public for water and sewerage service together, thereby causing the patrons of the plaintiff to discontinue taking the plaintiff's water. The bill prayed for an injunction against such discrimination in the future and the decree of the lower court granting an injunction was affirmed upon appeal. *City of Mobile v. Bienville Water Supply Co.*, So. 30 Rep. 445. The interesting feature of the case is that the injunction was obtained not by a person discriminated against, but by a rival company which by reason of the discrimination was threatened with the loss of its business. The case, therefore, stands for the proposition that a corporation engaged in a public employment may not build up its own business by discriminating against persons trading with a rival, and a rival damaged by such action may have it enjoined although not itself the direct victim of the discrimination.

The dividing line between fair and unfair competition has never been clearly indicated and it is impossible to mark it off with anything like precision. An early case decided that an action lay against a rival who injured the plaintiff's business by the intimidation of his prospective patrons. *Tarleton v. M'Gawly*, Peake 205. The trade union cases are every day illustrations of the doctrine that violence actual or threatened against persons trading with or employed by the plaintiff is a legal injury to him if resulting in damage to his business. The trade mark and trade name cases show that the deceiving of the public by the counterfeiting or simulation of the plaintiff's goods resulting in his damage may be enjoined by him. *Reddaway v. Banham* [1896], A. C. 199. Another example of an act tortious as regards a third person and resulting in damage to the plaintiff's trade being held within the principle of unfair competition is *Hughes v. Mc Donough*, 43 N. J. Law. 459. On the other hand not every act tortious as regards prospective customers of the plaintiff and resulting in damage to his business, will be enjoined at his request. Deceit of the public as to the quality of goods, false testimonials and

untrue representations of fact, although drawing away trade that otherwise would go to the plaintiff do not entitle him to the intervention of the Courts. *American Washboard Co. v. Saginaw Manufacturing Co.*, 108 Fed. Rep. 281.

The question is one of sound public policy and practical expediency. On the one hand should be considered the necessity of protecting a man's right to that trade which he has built up by his industry and enterprise, a right of property, possessing commercial value and frequently bought and sold. On the other hand lies the danger of opening too wide a field of litigation and extending the range of tort liability too far beyond those persons against whom the wrongful acts are primarily directed. The principal case is one about which no difference of opinion will arise as to the expediency and good policy of equitable intervention. Corporations engaged in public employments should not be permitted to build up their own or another business by the abuse of those powers with which by reason of the nature of their calling, they have become invested. The discrimination complained of in the principal case was clearly such an abuse. The fact that under the circumstances the persons directly discriminated against were not likely to complain rendered the damage to the plaintiff all the more certain and the good policy of the court's intervention all the more clear.

Harvard Law Review.

REVIEWS.

A Manual of the Principles of Equity, by JOHN INDERMAUR, 5th Edition, published by George Barber, Farnival Street, London; price 20s. :—

This is a concise treatise upon the principles of equity and is mainly intended for students. Snell's Principles of Equity has long been the most popular book among the law students in this country, and though we do not think it likely that its popularity will be affected by Mr. Inderman's book, the latter deserves credit for having condensed the principles of equity into a handy volume and presenting them in a clear and readable style. The author has incorporated in this Edition all the important cases since its last appearance in 1897. The fact that five Editions have appeared within the space of 16 years is proof of the usefulness of the work and its appreciation by those for whom it is intended.

We beg to acknowledge receipt of the following publications:—

The Law Relating to Cheques, by Eric R. Watson, LL.B., published by Messrs. Sweet and Maxwell, Ltd., 3 Chancery Lane, London, W. C. Price 2s. 6d.

Yearly Digest of Reported Cases for 1901, by Edward Beal, published by Messrs. Butterworth & Co., 12 Bell Yard, Temple Bar, W. C. Price 15s.

The Annual Digest of Cases (for 1901), by John Mews published by Messrs. Sweet and Maxwell, Ltd., 3 Chancery Lane, London.

Culcutta Weekly Notes	for	..	..	March.
Columbia Law Review	„	...	...	do.
Green Bag	„	...	...	do.
Kayastha Samashar	„	..	...	do.
Canadian Law Times	„	..	...	do.
The Law Magazine and Review	„	...	...	February.
Virginia Law Register	„	...	...	March.
Law Magazine and Review	„	...	...	February.
Case and Comment	„	...	...	do.
Indian Review	„	...	...	March.
The Bombay Law Reporter	„	...	...	do.
The Law Students' Helper	„	...	...	do.
The Lawyer	„	...	...	do.
Punjab Law Reporter	„	...	...	do.
The Australian Law Times	„	...	...	do.
Canada Law Journal	„	...	...	do.
The Law Students' Journal	„	...	..	do.
The Kathiawar Law Reports	„	...	...	do.
The Digest	„	...	...	January.
Burmah Law Reports	„	...	...	February.
General Digest	„	...	...	do.
Harvard Law Review	„	...	...	Feb. and March.
Law Notes	„	...	..	do.
American Lawyer	„	...	...	do.
Bankruptcy cases (advance sheets) Vol. VIII,	...	...	...	Part IV.

The Madras Law Journal.

PART IV.]

APRIL, 1902.

VOL. XII.

THE CIVIL PROCEDURE CODE BILL—(*Continued*).

WE now pass on to the chapter which deals with the institution of suits. With regard to the particulars to be contained in the plaint, there is an additional provision that the plaint should contain a specification of the age of each party or a statement that he is an adult or a minor as the case may be. As a rule it will not be possible for a plaintiff to specify the ages of the defendants, and he can only make a statement that the defendant is an adult or a minor. The practice at present is that in the case of a minor he is described as a minor and in the case of an adult, it is not usual to make a statement that he is an adult. The rule that a minor should be described as such is sufficient, and the new clause is both useless and unnecessary. A change is made with regard to the mode of verification of plaints which seems to be needless and vexatious. The person verifying a plaint is required to specify which paragraphs of the plaint he verifies of his own knowledge and which paragraphs he verifies upon information received and believed to be true. This mode of verification is not likely to assist the defendant very much and cannot dispense with the examination of the plaintiff. Under section 53 power is given to courts to reject a plaint that is obviously frivolous or vexatious. The courts in England possess this power, but it has to be used with great discrimination. In the hands of judges who are trained lawyers and who are not oppressed by a fear of statistical criticism the power is not likely to be abused; but we have some misgivings as to the manner in which the power is likely to be exercised by the mofussil courts. It is difficult to see the meaning of draft section 54(a) with regard to the extension of time for making amendments. It empowers the courts to extend from time to time any

period fixed by it for amending the plaint or correcting the valuation or supplying the deficient stamp duty even after the expiration of the period of time first allowed. But it proposes a limit to the exercise of this power by saying that, subject to the provisions of section 54(b), any period so fixed or extended by the court shall be so fixed or extended as not to exceed the period allowed for the institution of the suit by the law of limitation. Supposing that a suit was filed on the last day allowed by the law of limitation, would or would not the court have the power to grant time for the purposes mentioned in sections 53 and 54? According to the grammatical construction of the draft section the court can grant time in such a case, but the time granted should not be longer than the time allowed for the suit by the law of limitation. If the period prescribed by the law of limitation is three years, the time allowed for amendment must not be more than three years. If this is what the framer of the Bill intended, the provision is unnecessary for the time allowed by the courts for amendment of a plaint is seldom so long as the time prescribed by the Limitation Act. If, on the other hand, it is intended that the time allowed for amendment *plus* the period which has elapsed between the date of the cause of action and the order for amendment should not exceed the period prescribed by the law of limitation, the section is bound to cause great hardship. In the hypothetical case we have put, the court will be powerless to grant any time for amendment. The necessity for an amendment of the plaint may be discovered after the limitation for the suit has expired, and the plaintiff may have acted under a *bona fide* mistake. It will be unreasonable that in such a case he should not be allowed any time for amendment. The principle upon which the English Courts act is laid down by *Brett, M. R.*, in *Charapeds v. Commercial Union Association*, 32 W. R., p. 263, "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice to the other side, if it can be compensated for by costs." The provision that the copies of the plaint and concise statements to be furnished by the plaintiff shall be signed and verified serves no purpose except that of imposing a useless task upon the plaintiff and is uncalled for.

In the chapter dealing with the appearance of parties, it is declared that when an *ex parte* decree is set aside, all processes in execution on it shall, to the extent to which it has been set aside, be deemed to be avoided. But the proviso to this section that no order made under this section shall avoid a sale of property made to a *bona fide* purchaser for value, unless such purchaser is the decree-holder, appears to us to be indefensible and unjust. The defendant and the purchaser being both free from blame there is no reason why the defendant should suffer and not the purchaser. If the sale were set aside, the purchaser would merely be prevented from acquiring property which he did not previously have. On the other hand, if the sale were not set aside, the defendant who has acted innocently will be deprived of his property irrespective of the merits of his defence. While the purchaser can be placed in *statu quo* by refund of the purchase money if the sale is set aside, the defendant cannot be placed in *statu quo* if the sale is not set aside. The proviso should, therefore, be expunged.

Passing on to the chapter on written statements, we see no reason for the rule that when a summons has been issued for the final disposal of the suit, no written statement should be tendered except by leave of the court. It is desirable that the defendant should be allowed to state his own case in writing, as he thinks proper, and should be allowed to do so as a matter of course. Courts often overlook some of the points raised by the parties, and if there is no record of the statement of defence the judgment complained against will be assumed to deal with all points which have been raised, and it will be taken that the defendant did not raise the point even though, as a matter of fact, he might have done so. Every written statement is required to contain a statement of all the documentary evidence of every description which is in the possession or power of the party tendering it and upon which he intends to rely as essential to his case. While there is no necessity for this provision, it is likely to work considerable hardship to defendants. The rule obtaining under the existing code is that the defendant must have in readiness at the first hearing all the documents upon which he intends to rely. Nobody has ever complained that the existing rule is defective or has led to any evil. On the other hand, the feeling of the profession and of parties is that the existing

provision in regard to the filing of lists of documents is unduly stringent. It may be suggested that as the plaintiff is bound to file a list of documents with his plaint, the defendant should, for the sake of uniformity, be also compelled to file a list of documents with the written statement. But there is really no analogy between the position of a plaintiff who chooses his time of attack and that of the defendant whose hand is forced by the plaintiff and by the court, and who may not be able, within the time allowed by the court for filing the written statement, to ascertain or secure the evidence which will go to support his defence. Even in the case of the plaintiff the rule relating to the list of documents often works hard, as he may not be able to anticipate the defence and know beforehand what documents are necessary to meet the defence. Many matters which the plaintiff might otherwise have to prove would become unnecessary by reason of admissions in the defence. There is no reason therefore to compel even a plaintiff to file a list of documents with the plaint, the most suitable time for making an order about the filing of documents or lists of documents being the time of settlement of issues. The proper course is to give the parties a certain period of time after the settlement of issues within which documents or lists of them should be filed. So far as any information is required by either party of the documents to be filed by his opponent, the provisions relating to discovery are amply sufficient.

The law relating to set-off has been very materially modified and on the whole to the advantage of parties. Under the existing law the right to set-off is confined to suits for the recovery of money, in which the defendant has a claim against the plaintiff for an ascertained sum of money. It has been held by the courts that this provision is not exhaustive of the right to set-off and they have allowed a defendant to set-off even a claim to unliquidated damages, where it arises out of the same transaction as that to which the plaintiff's claim relates. Under the English practice the defendant has much larger rights, and it is open to him either to plead a set-off or a counter-claim. The framer of the bill evidently intends to bring the law in India into conformity with the English rules, but the way in which the section has been drafted illustrates the crudity even of the copying process. Section 111 makes no reference to a

counter-claim, though much of the language used in the body of sub-section 1 to section 111 would be appropriate only to a counter-claim and not to a set-off. A set-off is a statutory defence to the whole or part of a plaintiff's claim. A counter-claim need not be an action of the same nature as the plaintiff's action. The words that "the defendant may set-off against a claim of the plaintiff any right or claim" are appropriate to a case where the defendant's action is not of the same nature as the plaintiff's and is in the nature of a counter-claim. Supposing the plaintiff brings a suit for money and the defendant claims to recover land from the plaintiff, we do not see how it will be possible to set off the land against the money. The proper course will be to adopt the language used in Order 19, Rule 3 of the Rules of English Practice.

The proviso to section 116 of the Bill prohibits any amendment of a written statement so as to convert the case of the party tendering it into a case of another and inconsistent character. We see no reason for introducing any restriction of this kind, but on the other hand, it is eminently desirable that parties should have the same liberty to amend their pleadings that is conferred by Order 28 of the English Rules of Practice. It should also be borne in mind that the doctrine of *Res judicata* operates much more hardly against a defendant than against a plaintiff and that a defendant is bound to put forward every possible answer which he can make to defeat the plaintiff's claim. If through some oversight a defendant fails to put forward one of several alternative defences, there is no reason why he should not be allowed to amend his statement by setting up an alternative defence even though it may be of an inconsistent character.

With regard to the mode of taking evidence in trials the procedure now prescribed in non-appealable cases is extended to those appealable cases or classes of cases in which the court or the judge may be empowered by the local Government to adopt the procedure in non-appealable cases. A record of the evidence at length is very necessary for an effective exercise of the jurisdiction of the appellate courts, and is an important safeguard to the parties against the errors, perversities or vagaries of the courts of first instance. The removal of this safeguard will practically nullify the right of appeal which the law gives to parties. The recent

resolution of the Government of the United Provinces about the necessity of a double record of the evidence in criminal cases proceeds upon considerations which are equally applicable to civil cases.

Sections 198 and 200 have been altered in a somewhat amusing fashion. While the draft sections lay down the manner in which judgments should be delivered, there is no provision compelling the court to pronounce a judgment. The result of the amendment is that if a judgment is to be delivered, it should be delivered in the manner prescribed; but there are no words laying down that a court *shall* pronounce judgment. A somewhat novel provision is introduced with regard to the drawing up of decrees to the effect that where a party is represented by a pleader, the pleader should be required to sign the decree. If the object of the provision is to secure evidence of the fact that the judgment was delivered in the presence of a pleader, the section is unnecessary. But if the object is, as we think, to secure evidence of the approval of the decree by the pleader, we do not think that in the case of mofussil courts it will be expedient to shift the responsibility for the correct drawing up of decrees from the courts to the pleaders of the parties. Where an application is made to amend a decree under section 206 and the court amends a decree, there has been a conflict of decisions as to whether there is a right of appeal against such an order. The new section declares that no appeal shall lie from an order amending a decree, but the court altering or adding to a decree otherwise than is permitted by the code, is to be deemed to have acted with material irregularity within the meaning of section 622. The section appears to us to be defective in two respects. The court may erroneously refuse to amend a decree, and the party may have discovered the mistake after the time for appeal has expired. It is necessary that there should be a remedy against an order refusing to amend the decree also. In the second place, the court amending a decree may have acted under circumstances justifying its interference with the decree, but the amendment may be erroneous in substance. In such a case it is doubtful whether the High Court can interfere under section 622. A right of appeal will probably be a better remedy than a right to apply for a revision.

Coming now to the chapter on execution of decrees, we find in section 230 that the limitation of twelve years is expressed without any material improvement in language. Under the existing section doubts have arisen whether, if an application was made before the expiry of the twelve years and is pending at the expiry of 12 years, the court can grant the application after the 12 years. It has been held by the Madras High Court, contrary to the grammatical construction of the section, that an application can be granted after 12 years if it has been made before the 12 years. The language of the new section is that no subsequent order for the execution of the same decree shall be made upon any fresh application after the expiration of 12 years. The words 'after the expiration of 12 years' may qualify either the word 'application' or the word 'made.' It would, therefore, be better if the section enacted that no fresh application should be received after the expiration of 12 years.

Sections 248 (a) to 248 (m) contain elaborate provisions for the procedure to be followed in disposing of execution petitions. It is more or less the same as the procedure prescribed in chapter VII. We think, however, that section 248 (f) is unnecessarily stringent in declaring that if an execution petition has been dismissed for default, the decree-holder is bound to get the order of dismissal set aside by an application within 15 days, and that unless such an order for dismissal is set aside, the decree-holder should be precluded from executing the decree. Many a decree-holder may be deprived of the fruits of a hard-won decree, merely by reason of his omission to appear on the date fixed for the disposal of the application, unless he is able to satisfy the court, which it may not be always easy or possible to do, that he had sufficient cause for not appearing on the date fixed. Section 248 (h) is intended to abolish the anomalous practice of striking off cases which has been followed by the courts. The section, however, is not consistent and logical. Under the 1st part of section 248 (h) when the decree-holder satisfies the court that it will be useless to continue the execution proceedings, the court should stay the proceedings either indefinitely or for a specific period and remove the application from the list of pending cases. Such an order does not amount to a dismissal or disposal of the application which must be held to be kept alive. Under section 248 (i) when a fresh application for execution is admitted, the proceedings in execution must be taken up at the point

at which they were left when the proceedings were stayed. This also shows that an application which is stayed is merely kept in a state of suspended animation. But section 248 (h) cl. 2, which is not expressed very happily, seems to contemplate a fresh application for execution. There is no necessity for a fresh application when the old application is still alive. All that is required is an application to continue the proceedings commenced upon the old application.

The next amendment we have to notice is that in section 258 whereby a payment or adjustment which has not been certified is prohibited from being recognized by *any court* and not merely by the court executing the decree. A judgment debtor who makes a payment or adjustment out of court very often trusts the decree-holder to certify the payment or adjustment, and finally discovers that he has been deceived by the decree-holder and that the payment or adjustment has not been certified. While the convenience of the executing court may require that it should not be obliged to enquire into any alleged satisfaction of a decree which has not been duly reported, it would be encouraging fraud to prevent any court from recognizing the payment. The procedure relating to garnishee orders has been borrowed from the English Rules of Practice, and is a very useful addition. Under the existing law debts due to the judgment-debtor by third persons which have not culminated in decrees have to be sold in execution, and the procedure places the judgment-debtor at a great disadvantage inasmuch as the debt is always sold for a low price. But by following the garnishee procedure the ruinous consequences of a court sale will be avoided. It is, however, a mistake to direct that if the garnishee disputes his liability the court may proceed in the manner prescribed by section 278. Considering the serious consequences of an order adverse to the garnishee, a summary trial is unjust and it will be unfair to deprive the garnishee of a right of appeal and drive him to a regular suit while he would have a right of appeal if he had been sued by his creditor direct. In section 283 a penalty is enacted against a person who omits to prefer a claim, and he is placed in the same position as a person who makes a claim and fails. As the section is worded, it imposes a very oppressive burden upon strangers who may

have no knowledge of an attachment against their property. It imposes upon them the obligation of finding out whether anybody in the world has issued an attachment against their decree to the execution of which they are not parties. If instead of placing upon such strangers the burden of proving that they could with reasonable care and diligence have preferred an objection, the section should lay a penalty upon strangers who having knowledge of an attachment did not prefer their claims, it might be less objectionable. Section 285 does not attempt any answer to the question whether a small cause court is to be regarded as superior or inferior to a court of ordinary original jurisdiction. The amendment of section 285 has been carried out in an absurd manner and is a mere incoherent patchwork of some of the decisions. The provision in the present section that the court that shall receive or realise the attached property shall be the court of the highest grade or the court which has first made the attachment has disappeared from the draft section. And we do not understand what is meant by rendering the provisions of section 285 applicable to a proceeding under section 295. If there are two courts simultaneously executing decrees against the same debtor, neither court is bound to give notice to the other, and the effect of cl. 4 of section 285 will be that in every case a sale held by an inferior court will be valid, notwithstanding that under the 1st clause of section 285 the superior court is declared to be the proper court. Even where an inferior court has notice of an attachment by the superior court, there is nothing in section 285 to take away its power of bringing the property to sale.

(To be continued).

NOTES OF INDIAN CASES.

Savarimuthu v. Aithurusu Rowthar, I. L. R. 25 M. 103 :—There is no doubt the Full Bench is right. Profits obtained by a person taking possession of land in execution of a decree which he is obliged to refund when the decree is reversed on appeal cannot be sued for in a small cause court. Art. 31 of the Provincial Small Cause Courts Act is clear; and if there could be any doubt upon the question, Art. 109 of the Limitation Act must set the matter at rest. But the reference to the Full Bench was somewhat abortive. The Division Bench that made the reference took a broader ground.

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Apparently they seem inclined to hold that in all cases where the defendant is not a mere trespasser against whom damages are claimed for interference with possession, but a person who receives profits while in wrongful possession of property, the suit against him for such profits falls within Art. 31 of the Provincial Small Cause Courts Act. Two of the three judges, who composed the Full Bench had on previous occasions taken a different and, with all respect, an erroneous view. They were now invited to pronounce upon the broad question, which is a case of every day occurrence and upon which a pronouncement by the Full Bench is desirable, but they contented themselves with merely disposing of the particular case on hand. This, we say, is unsatisfactory.

Durasami v. Venkataseshayyar, I. L. R., 25 M. 108:—This case raises a question of some novelty. The point is whether a person who has got two mortgages of the same property can sue upon the first mortgage without putting the second mortgage into Court. The decision of the Court is that no such suit will lie. It must be confessed that there is no express statement to that effect in the Act. It is plain that the mortgagee cannot ask for a decree for sale subject to the second mortgage which is in his favour. The whole property is his security and must be sold free of incumbrances. The effect of such a sale is to extinguish the second mortgage. But what we are unable to see is that the mortgagee should sue upon the second mortgage as well. It may be that the term of the second mortgage has not expired; or that there is no covenant for sale in it. In both these cases, it seems to follow that the sale will be free of the subsequent incumbrance though the suit is not upon the subsequent incumbrance. It does not, however, follow that both the mortgages should be sued upon. In the absence of a specific statutory requirement compelling the mortgagee to put both the mortgages in Court, we are not satisfied that there is any reasonable inference deducible from the object and scope of the Act that the mortgagee is bound so to act. The fact that the mortgagor must redeem all the mortgages together and not merely one of them is not decisive of the question of the mortgagee's obligation to sue upon all his mortgages; nor can we attach much importance to the form of re-conveyance under the Code of Civil Procedure. Mr. Justice *Bhashyam Aiyangar*, seems inclined to hold, though he does not

decide it, that a mortgagee holding two mortgages is not entitled to sue upon his second mortgage subject to the first. This, we think, is more open to question than the point decided in the case.

. . **Mahummad Mohidin Sait v. The Municipal Commissioners for the City of Madras**, I. L. R., 25 M 118 :—This was a case of the Municipality opening a burning ground near the plaintiff's house. Both the learned Judges came to the conclusion that no nuisance was in fact proved. But the *dictum* of the Chief Justice that if an actionable nuisance had been proved the defendants were protected by the language of the Municipal Act requires to be further considered. The Act, no doubt, casts upon the Commissioners the duty of providing convenient and suitable places for burning grounds. Convenience and suitability are terms relative to the needs of the inhabitants. The place might satisfy both these conditions and be still an actionable nuisance by reason of the injury being caused to the neighbouring house owner. Because the Municipality was under an obligation to do something, it does not follow they are entitled to do it so as to cause injury to another unless it was impossible to do it otherwise. The fact that S. 436 of the Act provides for compensation for persons sustaining damage is an argument rather in favour of the plaintiff's right of action. The distinction between this case and *The London and Brighton Railway Co. vs. Truman*, 11 A. C. 45 lies in the fact that in the latter case, as a matter of physical necessity, the lands could only be taken where they could be used for the purpose of the Railway authorized by the Act. It may be if there was no other means of satisfying the obligation imposed by the Act of providing burning grounds than the selection of the particular place, no action would lie. The Municipality had to establish that; but they failed to do it. There are no doubt some general observations in the judgment of Lord *Selborne* which might seem to countenance the view of the Chief Justice, but, read in their context, they do not seem to us to lead to the conclusion at which the learned Chief Justice has arrived.

Sudarsana Maistri v. Narasimhulu Maistri, I L. R., 25 M. 149 :—The judgment of Mr. Justice *Bhashyam Aiyangar* in this case deals with several interesting questions of Hindu Law; and though it does not make a definite pronouncement on some of them, there can be no doubt it is one of the many masterly judgments.

which he has delivered during the short tenure of his judicial office. His theory that there can be no joint family within a joint family may perhaps be correct, but we are not satisfied that there is any authority in support of that view. He evolves the theory from the very nature and constitution of the joint family. He is willing to admit an exception that one branch may constitute a sub-family of the larger corporation, on the analogy of the Thavali in relation to the tarwad. If this be so, the question naturally arises why should not two out of several branches be a sub-family of the larger family consisting of all the branches. Some of the members may be separated in a Hindu family and the rest may remain joint. There is no rule that partition involves a severance in interest among all the members. The members of the family may be divided in respect of part of the properties and remain undivided in respect of the remainder. Suppose two members of the family took jointly some property in a division of part of the family property. Then it must be admitted that the whole family is joint with reference to the undivided property while two members are alone joint with reference to the property divided and taken by them jointly. The question is very important and deserves full consideration.

Oriental Government Security Life Assurance Company, Limited v. Narasimha Chari, I. L. R., 25 M. 183 :—An insurance case is a rarity in the Indian reports and the decision in this case will not be a recommendation to people who already fight shy of Insurance Companies. We do not, however, mean to impugn the law laid down. We have no doubt of the obligation to state the age correctly and the correct statement of the age being a condition attaching to the obligation for the payment of the policy. Mr. Justice *Bhashyam Aiyangar* has expounded the law on the subject in a very lucid judgment which amply repays perusal.

Kashi Prosad Singh v. Secretary of State for India, I. L. R., 29 C. 140. The decision in this case is of much practical importance. It is held that where the subject-matter is different but the parties are substantially the same and the evidence is also the same, there is nothing in the Civil Procedure Code precluding a court from consolidating the several suits relating to these different matters or the appellate court from making a similar order with

reference to the appeals preferred from decrees passed therein. Court fee, however, will be levied on the basis of the value of each of such appeals until the limit of Rs. 3,000 is reached when a court-fee of Rs. 3,000 will be sufficient for all such appeals. There is no section in the Civil Procedure Code dealing with the matter under consolidation, though section 25 of the Civil Procedure Code will allow of a transfer to one court of all such cases if they are Civil instituted or filed in different courts. At the same time, as has been pointed out by the Calcutta Court, there is nothing in the Procedure Code prohibiting such a course.

The question of court-fee raised and decided in this case is one of more difficulty. The judges follow a case *Raghobir Singh v. Dharam Kuar*, I. L. R., 3 A. 108 (F.B.). There, however, there was only one suit, and the court held that the suit comprised two different subjects. What they were was not stated and could not be ascertained, there being no report of the facts. In the Calcutta case there were different suits against different tenants, and the Zemindar was a common party in all the cases. The question of course was one in all the cases. Each suit comprised only one subject, and a distinct court-fee was payable on each of such suits and the proviso at the end of Art. I, Sch. I, would not apply. The Zemindar alone appealed in all the cases and his appeals were consolidated. The fact of consolidation is said to make a difference. But there are different and distinct memoranda of appeals and section 17 though it may be subject to the proviso at the end of Art. I, Sch. 1 (against which nothing can be said) does not apply.

Ghulam Khan v. Muhammad Hussan, I. L. R., 29 C. 167:—

In this case the Privy Council expressed their opinion upon some of the disputed points that had been the subject of decision in the Indian Courts with reference to the chapter on arbitration, and in the light of this opinion more than one decision of this Court—not to say of other Courts—may have to be re-considered. The chief point the Privy Council considered was as to the finality of an award. But unfortunately, there is some vagueness in their judgment, and it is impossible to see what their meaning is in more than one place. This vagueness might be due to the fact that the other side was not represented,

In the case of a reference pending suit when all proceedings from first to last are under the supervision of Court, an award submitted to Court may be corrected or modified under section 518, C. P. C. If so corrected or modified, an appeal is provided for under clause 26 of section 588, C. P. C. It may be remitted under section 520, C. P. C., or set aside under section 521, C. P. C. No appeal is provided for under section 588 in case an award is so remitted or set aside. The Privy Council do not say what course is open to the aggrieved party in such cases. If the award is set aside, then the court has itself to decide the suit and from a decree passed in the suit an appeal lies under sections 2 and 540, and the legality of the order under section 521 (setting aside the award) may be questioned in such appeal, and if the court holds that the order is wrong, judgment will be given in accordance with the award by the appellate court and section 522, C. P. C., will prohibit a second appeal from such decree to the High Court.

If the award is not set aside under section 521, C. P. C., either because the court has not remitted the award and no application has been made to set aside the award, or because the application to set aside having been made is rejected by the court, judgment will be given in accordance with the award and upon such judgment a decree will follow which is not appealable except in so far as the decree is in excess of or not in accordance with the award under section 522, C. P. C. The Judicial Committee hold that neither an appeal will lie from such decree nor a revision under section 622, C. P. C. Apparently their Lordships' view is that an application in revision against the order of the court below refusing to set aside the award and passing a decree in accordance therewith will be incompetent for two reasons: (1) no question of jurisdiction can arise; (2) such an application must be treated as an application to set aside the award within the meaning of Article 158, Sch. II of the Limitation Act, and therefore will be barred by limitation if the revision is not put in within ten days from the date of the award excluding the time taken in obtaining copies. The Privy Council apparently do not notice that a revision will not lie to the High Court direct from the award submitted by the arbitrators, but that the application to set aside must in the first instance be made to the court to which the award is submitted and a revision can only lie from the

order passed on such application. What is to be done, if the order of reference is not valid either because there has been no agreement to refer, or because the agreement to refer and the application to the court founded upon it has not the concurrence of all parties concerned, is left rather vague by the Privy Council. Some distinction is drawn by their Lordships between Head I and Heads II and III, but what follows from that distinction is not stated. This is what Lord Lindley observes on this point: "There is this difference which does not seem to have always been kept in view in the Courts in India. In cases falling under Head I the agreement to refer and the application to the court founded upon it must have the concurrence of all parties concerned and the actual reference is *the order of the court*. So that no question can arise as to *the regularity of the proceedings up to that point*."

In the case of Heads II and III, preliminary proceedings must be taken to bring the matter under the cognizance of the court and the court has to pass an order thereon, *i. e.*, in the case of the agreement to refer, the order directing the agreement to be filed under section 523, C. P. C. and in the case of an award, the order directing the award to be filed under sections 525 and 526, C. P. C. Such orders are decrees under section 2 and are appealable under section 540; and a second appeal will also lie therefrom.

In the case of the agreement to refer, it may not be filed if the reference is not valid or is denied, and the court holds that there is no reference in fact when an appeal will lie (see also *Gowdu Magata vs. Gowdu Bhagavan*, I. L. R. 22 M. 299). If the agreement is ordered to be filed, then also the order is a decree and is appealable separately. But the award made in pursuance of such order if not set aside under sections 520 and 521, is not appealable under the last part of section 522. This is the effect of section 524, C. P. C., which, it is significant to note, is absent in the case of Head III.

In the case of an award for filing which an application lies under section 525, it may be ordered to be filed if the reference is valid and is not in dispute and if no ground (see section 526) is shown against the award, of the nature mentioned in sections 520 and 521, an order directing the filing of the award may be made under section 526 and such order is a decree and is appealable as such. So that if the first court holds that cause is not shown against the filing

of the award under sections 520 and 521, the aggrieved party may appeal to the superior court and get an adjudication upon the same, and there may also be a second appeal from such decision. This, however, cannot be done in the case of Heads I and II. This distinction results from the fact of there being no provision in Head III corresponding to section 524, C. P. C.

The reason for the rule in Head III (awards) is obvious. If no application is made under the special provisions of this chapter but the award is brought in issue either as a basis of a claim by the plaintiff, or as a ground of defence by the defendant in any suit, then the validity of the award (including the matters mentioned in sections 520 and 521) may be tried by the court of first instance subject to correction on appeal and second appeal. (See *Rani Bhagoti v. Rani Chandan*, L. R., 12 I. A., p. 67). It can hardly be supposed that a different rule should prevail when an application is made to file the same as a decree of court under section 525, C. P. C.

Another point of importance decided by the Judicial Committee, is that an agreement to refer matters in dispute to an arbitrator is not an agreement or compromise within the meaning of section 462, C. P. C., and does not, therefore, require the sanction of the court.

SUMMARY OF RECENT CASES.

Reversioner, interest of—Transfer of such interest by way of mortgage—Invalid.

Nand Kishore Lal v. Kanee Ram Tewary, 6 C. W. N. p. 395.

The interest of a Hindu reversioner expectant upon the death of a Hindu is not such an interest as can be validly transferred or mortgaged. The decision in *Brahmo Deo Narayan v. Harjan Singh*, I. L. R., 25 C. 778; must be taken as overruled by the decision of the Privy Council in *Sham Sundar Lal v. Achan Kunwar*, L. R. 25 I. A. 483.

Promissory note—Collateral security—Possession by the debtor of the pronote and the title deeds—Presumption—Entries in accounts—Corroborative evidence.

Bhoy Hong Kong v. R. M. M. S. P. Ramanathan Chetty,
6 C. W. N. 401.

The *prima facie* presumption where the instrument of debt and security for that debt are in the possession of the debtor is that the debt has been discharged. But where, according to the debtor's own case, there was some amount due under the pronote, at the time when the pronote and the title-deeds given for the security for such debt were handed to the debtor, they were not handed to the debtor in the ordinary course of discharge by payment and the *prima facie* presumption arising from possession of the instrument of debt and the title-deeds would be rebutted.

Entries in the creditor's books of account regularly kept showing that the title-deeds and note were returned on a certain date may be used not only for the purpose of refreshing the memory of the creditor, but also as corroborative evidence of the story which he tells, viz., the fact that they were delivered on a certain date.

Books of account containing only entries as to a particular transaction or facts relating to such transaction are less reliable than books recording, in the ordinary course of business, a particular transaction in common with others.

Land Acquisition Act—Compensation for level crossing across a private road—Reference by Collector.

Madusudan Das v. The Collector of Cuttack. 6 C. W. N. 406.

Where a Railway Company puts up a level crossing across a person's private road which gives access to his house, such person is entitled to compensation under section 23, sub-section 4 of the Land Acquisition Act (I of 1894) if he can shew that he has sustained damage or loss by reason of his other property (house) having been injuriously affected by the making of the level crossing.

Under section 19, cl. (d) of the Land Acquisition Act the Collector in making a reference to the court should state the grounds on which he determined the amount of compensation.

Dispute as to possession—Breach of peace—Nature of proceeding under section 145, Criminal Procedure Code—Magistrate's right to cancel his order under sub-section 1—Revisional powers of High Court.

Manindra Chandra Nandi v. Barada Kanta Roy Chowdhury
6 C. W. N. 417.

The existence of a dispute likely to cause a breach of the peace is a condition precedent to the jurisdiction of the Magistrate to enter upon an enquiry as to possession, and when a magistrate makes an order under sub-section 1, it is open to him to cancel such order and stay proceedings under section 145, even though he is not moved to do so by the opposing party or other person interested as contemplated in sub-section 5. No private person, even though he be a party to a proceeding under section 145 who may have set the magistrate in motion originally under that section, has any right to contest the propriety of such order (*viz.*, refusing to make an enquiry as to possession).

The effect of the change made by Act V of 1898 (sec. 435, sub-section (3)) is to place the orders under Ch. XII in the same category as orders under sections 143 and 144, so that the High Court cannot under the code exercise the powers of revision, though if an order is made without jurisdiction, *i. e.*, outside the section, the High Court may interfere under section 15 of the Charter Act.

Security, to keep the peace, order for, on conviction—Powers of Appellate Court to set aside such order in appeal from conviction.

Abdul Waheduddin v. Amiran Bibi. 6 C. W. N. 422.

Where several accused are convicted of rioting under section 147, Penal Code, and are upon such conviction required to furnish security to keep the peace under section 106, Criminal Procedure Code, the Appellate Court on appeal by the accused from such conviction has power to set aside the order requiring security as being an incidental order under section 423, cl. (d), though the conviction may be upheld.

*Misjoinder of charges—Illegality.***Gobind Koeri v. King-Emperor.** 6 C. W. N. p. 468.

Where a person was discovered by some gangmen of unlawfully obstructing a railway by placing clod on the lines and was arrested, but is afterwards rescued by two others, *held* that all 3 must be tried separately as the offence under the Railway Act and the offence of unlawful rescue were distinct offences not committed in the same transaction, that the court had no jurisdiction to try such offences in one and the same trial, and that the convictions must be set aside as being illegal on account of such misjoinder and not merely irregular. *Subramania Iyer v. King-Emperor*, I. L. R., 25 M. 61 followed.

*Points not taken at trial—But taken for first time in appeal.***Karunartne v. Fernandez.** 6 C. W. N. clvi.

A court of appeal may allow and adjudicate on a ground put forward for the 1st time, provided two conditions are satisfied.

1stly :—that the facts bearing upon such contention exist before it as completely as would have been if the controversy had arisen at the trial.

2ndly :—that no satisfactory explanation could have been offered by those whose conduct is impugned if opportunity had been given them when in the witness-box. *The Tasmania L. R.* 15 App. Cases 223 followed.

Where therefore the question in the original trial was whether a testator had a sound disposing state of mind at the time of the execution of the will sought to be propounded, and the first court decided against the will, the defeated party could not set up in appeal that the testator had at any rate a sound disposing state of mind as to part of the property, and the appellate court could not uphold the will as to part as the evidence required for such limited range was very different from that given under the general plea and could not in the nature of things be expected to have been given or found in the evidence given in the cause.

Fraudulent ex parte Decree—Suit to set aside—Rejection of applications under sections 108 and 311, C. P. C., no bar.

Khagendra Nath Mahata v. Pran Nath Roy. 6 C. W. N. 473.

The scope of the enquiries under sections 108 and 311, C. P. C., is confined to specific matters therein stated and proceeds upon the basis of the existence of a real suit. It is directed to an attack on the regularity or sufficiency of the service or the proceedings and not to an attack of the whole suit as a fraud from beginning to end.

An adverse order under sections 108 and 311, C. P. C., will not debar a person from bringing a suit to set aside the whole decree and other proceedings connected therewith from beginning to end on the ground of fraud. The fraudulent and violent incidents of the progress of the first suit at the stage of service will be evidence of the fraud complained of in the second suit as being a part and *indicia* of the greater fraud.

Foreclosure decree against executor—Application by beneficiary and his vendor for redemption.

Mohananda Chatterjee v. Akhoy Kumar Barari. 6 C. W. N. 488.

The executor represents the estate of the mortgagor in a suit for foreclosure by the mortgagee, and after preliminary decree for foreclosure, the beneficiary is not entitled to be made a party and will not also be allowed to redeem.

Hindu Law—School of Law, Mitakshara—Presumption arising from place of origin—Family custom—Impartible estate, savings from—Self-acquired property.

Srimati Rani Parbati Kumari Debi v. Jagadish Chunder Dhabal. 6 C. W. N. 490.

When a family resident at a particular place where the Mitakshara school prevails migrates into a place where the Dayabhaga school prevails, the presumption is that the family continues to observe the Mitakshara, unless it is shown that the family has given up the customs of the place of origin and has adopted the customs and school of law prevailing in the place of their migration. The question in a case of disputed succession depends upon the custom of the family which is primarily a personal, as distinguished from a geographical, custom.

An ancestral impartible Raj descends not on the widows of the last holder but on his surviving undivided half brother.

The savings made from the impartible estate and the purchases made therefrom must follow the rule of the Mitakshara law as to self-acquired property, unless they are shown to have been treated by the impartible holder as part of the Raj. The mere fact that the rents are collected by the same servant who collects those of the Raj and that the collection papers are kept with the papers of the Raj, do not evidence such an intention.

Unsoundness of mind—Disease, temporary, brought on by voluntary drunkenness or intemperance—Ground of exemption from criminal responsibility—Indian Penal Code, sections 84 and 85.

King-Emperor v. Bhilepa Alom 6 C. W. N. 506.

Under section 85 of the Indian Penal Code incapacity caused by voluntary drunkenness is no ground of defence to an offence committed while under such incapacity.

But incapacity caused by a disease, though it may be temporary and produced by voluntary drunkenness, will be a valid defence as being unsoundness of mind under section 84, Penal Code.

Where an accused was addicted to intemperate habits by excessive use of opium and contracted a disease which produced an incapacity to know the nature of an act, or what was wrong or contrary to law, and killed a boy under circumstances which would otherwise ordinarily amount to murder, *held* that his case fell under section 84 and that he was therefore not guilty of any offence.

Confinement in a cell of a convict in Jail—Illegal—Penal Code, sections 114 and 342.

Boistab Chundra Shaha v. King Emperor 6 C. W. N. 511.

Where a prisoner is confined in a particular part of a prison without legal authority, such confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal. It is not correct law to say that there can be no wrongful confinement within an imprisonment.

Where, therefore, a Civil Hospital Assistant in a gaol, on refusal by a prisoner to submit to enema being administered, which was prescribed for the prisoner by the Civil Surgeon for curing him from

dysentery, ordered the prisoner to be confined in a cell and the prisoner was so confined, *held* that the Hospital Assistant was guilty of an offence under sections 342 and 114 of the Indian Penal Code and was punishable as such.

Hostile witness—Permission to cross-examine refused by Court—Weight of evidence.

Kalagur Suryanaryana v. Yarlagadda Naidoo 6 C. W. N. 513.

Where a witness unexpectedly makes statements adverse to the interest of the party calling him, it is common fairness that the latter should be given an opportunity to test such statements by cross-examination if they are to be relied on; otherwise the evidence is of no value.

Omission to seal by Registering officer—Mere defect of procedure—Registration not invalid—Registration Act (III of 77) sec 87.

Sita Nath Bandopadhyaya v. Bissessur Roy Chandhuri 6 C. W. N. 528.

The omission by a Registering officer to affix the seal to a document (which he is asked to register) as required by section 60 of the Registration Act (III of 1877) is a mere defect of procedure, and is cured by the provisions of section 87 of the same Act. Such a document in fact registered is not rendered invalid.

JOTTINGS AND CUTTINGS.

Judicial pressure for Compromise.—We have reason to believe that in several Mofussil courts the presiding judges exercise pressure upon suitors to make compromise. While a compromise by the parties *suo motu* may be encouraged by the granting of adjournments whenever the court considers that there is a reasonable prospect of such a compromise, judges ought to be extremely cautious in advising the parties to effect a compromise. While we do not deny that there are some exceptional cases in which a judge may suggest to the parties the desirability of an amicable settlement, we think that in the large majority of cases such advice should not proceed from the court and is liable to be misinterpreted. Some judges make a convenient general assumption that the truth must always lie between the

plaintiff's case and the defendant's and that if the plaintiff is induced to give up a portion of his claim, he will get all that is justly due to him. Even if the advice of the court proceeds from a conviction that it will be best for the parties to enter into a compromise, it is sure to be misunderstood and a suitor will naturally believe that if he does not accede to the judge's request, the judge will decide the case against him and he will feel obliged to make a sacrifice of what he may consider his just claims. Such a belief is not, however, altogether without foundation. While a few judges openly tell the parties that they will decide their cases against them, if they do not make a compromise, there are some others who are prejudiced against a party who refuses to enter into a compromise. It is needless to remark that such judges are utterly unworthy of their office and deserve to be removed from the service. The apprehension created in the minds of the parties by such advice is bound to exercise an unwholesome influence upon the administration of justice. While an honest plaintiff feels compelled to forego a part of his just demand, a dishonest litigant is tempted to launch a false claim in the hope that the defendant may be forced to come to terms with him. As a matter of fact the advice too often proceeds from the court from anything but a desire to consult the welfare of the parties. Very often it is due to the necessity of appeasing the demand of the High Court for statistics of out-turn of work and the desire to win recognition for rapid disposal. For this purpose it is considered best to advise a compromise after the defence has been put in and the trial has begun, as the efficiency of a judge is considered to depend upon the rapidity with which he disposes of contested suits. For, according to the rules of the High Court, if a suit has at any stage been contested, it must be entered in the returns as a contested suit though it may finally terminate by a compromise. Sometimes the advice proceeds from a desire to avoid an appeal and the application of the reversal test. Sometimes it proceeds from sheer indolence and a desire to shirk work. Whether judges are actually influenced by these motives or not, they should endeavour to avoid even the suspicion of being influenced by such motives and should therefore as a rule refrain from tendering any such advice.

Sanctions for perjury:—The provisions of the law relating to sanctions for perjury are too often frustrated by the mode in which they are worked by the courts both original and appellate. While it is of importance to the administration of justice that perjury should be punished, it is equally important that honest people should not be deterred from coming forward to give evidence. It is the necessity for protecting witnesses that has led the legislature to provide the safeguard of a preliminary sanction by the court before which the perjury is said to have been committed. If there is a clear case of perjury made out to the satisfaction of the judge who heard the evidence and if there is a reasonable certainty of securing a conviction, he would be justified in taking steps to have the offender brought to book. The more proper course to adopt is to proceed under S. 476 of the Criminal Procedure Code instead of giving sanction to a private party under S. 195. Too often a sanction is used as a weapon of extortion, and the prosecution is either not launched, or is so managed as to avoid a conviction. We may, however, state that if sanction is applied for and the judge thinks it a fit case for prosecution, it is no ground for refusing sanction that the application is made from vindictive motives. It is idle to suppose, as judges very often do, that parties will incur the trouble and expense of a prosecution solely from the desire to promote public interest. The better course, however, would be, as we have pointed out, to follow the procedure prescribed by section 476 of the Criminal Procedure Code. There are certain principles to be borne in mind which are frequently lost sight of by the courts. The courts very often forget that it is one thing to say that they are not prepared to believe a witness and quite another thing to say that the witness's statement must be false. The courts sometimes make the mistake of treating the different parts of a witness's deposition, as if they were two independent statements and holding any discrepancies or contradictions between the different parts to be proofs of a want of veracity. The deposition of a witness must generally be read as a whole and what may appear to be a discrepancy may supplement or correct a previous answer which is incomplete or incorrect either owing to the inadyvertence of the witness or the insistence (unfortunately too often encouraged by

the courts) of cross-examining counsel upon an answer in the shape of a categorical yes or no or owing to a mistake in recording the evidence. The courts must also take care not to act under section 195 or 476 unless they are satisfied that in all probability a conviction will be the result. Sometimes the courts act upon materials which at best may only create a suspicion of perjury. In such cases the courts fail to realize the responsibility which rests upon them of refraining from taking any steps likely to involve a waste of public time on the part of other courts. It is frequently said, and perhaps more often by appellate courts than by original courts, that by giving a sanction for prosecution they give the witness an opportunity of clearing his character. The remark argues a flippancy of spirit and very few witnesses regard it as a favour to be put in jeopardy of their liberty for the purpose of clearing their character, as it is called. We think that appellate courts more often fail in their duty with regard to sanctions than even the original courts. The law gives a right of appeal to a person against whom sanction has been given, and it is the function of the appellate court to examine the materials for itself and exercise its own independent judgment upon them instead of looking upon itself as a mere court of error. By refusing to so examine the materials, an appellate court is guilty of a dereliction of the duty which the law casts upon it and becomes a court of error in a different sense from that in which the term is ordinarily used.

* * *

Law Reform in England [The following is an extract taken from the American Law Review from an address before the Incorporated Law Society of England at its annual meeting at Oxford in October last by Sir Henry Fowler, M. P., G. O. S. I., president of the Society] :—

“Our criminal law in the year 1800 was savage in its barbarity. In that year there were more than 200 crimes punishable with death. Sir Samuel Romilly stated “that there was no other country in the world where so many and so large a variety of offences were punishable by loss of life.” The crime of stealing from the person about the value of 1 s., of stealing in a shop to value of 5s.; of stealing in a dwelling-house to the value of 40s.; of stealing anything from a bleaching ground; of pretending to be a Greenwich pensioner, and other trifling offences were capital crimes. During

the century that awful category of offences which incurred the penalty of death has been reduced from 200 to four—viz., high treason, murder, piracy with violence, and setting fire to the king's ships, dockyards, arsenals, naval and military stores. In the year 1899 out of twenty-nine persons who were sentenced to death only fifteen were executed. The whole scale of punishments which included transportation, the pillory, and the whipping of women has been modified, and, side by side with this diminution in capital offences and the severity of punishment for all other classes of crime, there has been an enormous reduction in the number of convictions notwithstanding the increase in the population. When Queen Victoria came to the throne in 1837 her convict subjects were about 53,000. The convicts in prison in the United Kingdom on the 31st December 1899, were 8,710, of whom only 270 were imprisoned for terms of twenty years and upwards. The population of the United Kingdom in 1837 was under 27,000,000, and in 1899 about 40,000,000. The annual average of criminal trials at assizes and quarter sessions in England and Wales for the last ten years of the first half of the century, viz., from 1840 to 1849, was 36,039. For the ten years from 1880 to 1889 of the second half of the century it was 14,470, and for the year 1899, 10,902. But these figures, including a large number of trifling offences, do not bring out the reduction in the class of serious crimes. The yearly average of persons sentenced to penal servitude in England and Wales in the five years ending the 31st December, 1864, was 2,800, out of a population of 20,370,000; the yearly average of persons sentenced to penal servitude in the five years ending the 31st December, 1899, was 770, out of a population of 31,000,000; and in the last year (1900) the number was 748. Up to the year 1836 the counsel for a prisoner charged with felony was only allowed to cross-examine the witnesses and to argue points of law; he could not address the jury on behalf of his client. The Prisoner's Counsel Act, 1836, gave the prisoner the right to be properly defended by counsel. It is worthy of note that twelve out of the fifteen judges strongly condemned this bill. Up to 1897 about twenty-six Acts were passed enabling accused persons in certain cases to give evidence, but it was not until the ninety-eighth year of the century that all accused persons were enabled to give evidence in their own behalf.

Our courts of equity and common law present changes and improvements as marked and as gratifying as those I have referred to in our criminal law. While the principles of equity which were administered by Lord Eldon and Sir William Grant (who in 1800 were the only two judges in chancery) have not been very materially changed during the century, the modes by which these principles were applied to enforce undoubted rights and to redress intolerable wrongs were a disgrace to the law and to the courts which allowed them. A chancery suit was regarded as a social civil war—a terrible calamity to be avoided like plague or pestilence. The initial proceeding of a chancery suit, called the bill (liable to be amended, revised and supplemented as the exigencies of the case required), with its recitals or rather copies of wills, deeds, and other instruments, its elaborate statement of the case of the plaintiffs, and which statement was repeated three times over, its allegations as to probable or possible defences, its suppositions of the matters which might avoid those defences, its interrogatories and all the other features of that extraordinary document, were well described by John Wesley, who in his journal says: “I called on the solicitor I had employed in the suit lately commenced against me in chancery, and here I first saw that foul monster—a chancery bill. A scroll it was of forty-two pages in large folio to tell a story which needed not to have taken up forty lines, and stuffed with such stupid, senseless, improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any heathen court either of Greece or Rome; and this is equity in a Christian country!” The answer when it came was of a similar character in length, weight, reiteration and irrelevancy, and then, after endless interlocutory proceedings had been disposed of, the parties had to wait probably a year or more before the so-called hearing of the cause, which was in fact only the beginning of the trial. Then came the reference to a master; the preparation of what was called a statement of facts, which recited the original and all supplementary bills, answers, further answers, and all the pleadings from first to last. This being left with the master, all the parties were served with what were called warrants on leaving and to proceed, and such was the state of business in the master’s offices that it was often years before his report was made and the final decision or direction of the court obtained. It was not

uncommon for four years to intervene between the setting down of the cause for trial and the final judgment. Petitions filed in 1810 were not disposed of in 1825. In the year 1811 there were thirty-six causes ready for hearing before Lord Eldon, that had been set down for hearing in and before the year 1808, and at the same date there were appeals waiting to be heard by the House of Lords that had been set down for upwards of ten years. The generations which endured these devastations of their property and denials of justice have passed away, but we have as a record—shall I say a monument—of the Court of Chancery, the scathing description of Charles Dickens. He says: "This is the Court of Chancery, which has its decaying house and its blighted lands in every shire, which has its worn-out lunatics in every madhouse, and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance; which gives to moneyed might the means abundantly of wearing out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart that there is not an honorable man among its practitioners who would not give, who does not often give the warning—'suffer any wrong that can be done you rather than come here.'" It is one of the triumphs of the nineteenth century that this horrible and disgraceful mockery of justice and equity has been swept away. As a contrast to the delays of those good old times, let me ask you in passing to compare them with the recent Taff Vale Railway case. A decision of the Vacation Judge was given on the 5th September, 1900; it was appealed from and heard by the Court of Appeal in the following November, and finally decided by the House of Lords on the 22nd July, 1901. Lord St. Leonards' Act of 1852 effected substantial reforms in Chancery procedure, and prepared the way for the still greater reforms which have been carried out under the judicature Acts.

Before the close of the eighteenth century the courts of law under the guidance of that great judge, Lord Mansfield, had widened their construction of the principles of the common law, and had adapted its principles to the questions which the development of our commercial enterprise were raising for the first time in Westminster Hall. But here again the procedure was cumbersome, antiquated, and oppressive—legal fictions, pedantic technicalities,

forms of action, rules of evidence, endless delays and all the intricacies of pleading appeared to be a combination to arrest, if not to defeat the progress of justice. The science of special pleading had its day, and although that day is over, it has taught lawyers how to ascertain what is the real dispute between the litigants, the relevancy and extent of the evidence, and the exact issue which the tribunal whether of law or fact is to try. The Common Law Procedure and Judicature Acts, the amendment of the law of evidence by the Act known as Lord Denman's Act, and the rules of practice have revolutionized and simplified the procedure of litigation, dealing in those disputes which are not exclusively confined to the courts of equity. The substance of justice is no longer sacrificed to the forms of procedure. In 1828 Lord Brougham, in a speech of many hours duration, brought before the House of Commons the defects of our legal and judicial system. This was followed by the appointment of a commission, which made a series of valuable reports, which ultimately led to the passing of the Common Law Procedure Acts of 1852, 1854, and 1860, and paved the way for the Judicature Commission and the Judicature Acts of 1873 and 1875.

The great reform in the administration of civil justice, a reform which was resisted for half a century, was the creation of the county courts. In the year 1833 a royal commission recommended the establishment of a general system of local courts for the recovery of small debts, but it was not until 1846 that the present system of county courts—a most inappropriate and misleading title—was established. There are now upwards of five hundred of these courts grouped into fifty-four circuits and served by fifty-four judges. Their original jurisdiction, limited to £ 20, has been very cautiously increased, and increased so as to include equity, bankruptcy, and admiralty proceedings, and to these have been added the special litigation involved in recent acts, such as the Agricultural Holdings Act, the Employers' Liability Act, and the Workmen's Compensation Act. The actions heard and determined in the High Court of Justice, County Court, and all other civil courts of every description, of first instance in the year 1899, were 428,579; 421,964 of that number were heard and determined in the county courts. Of the total amount recovered in the Queen's Bench Division, £ 2,313,758 was recovered under Order XIV.; £ 190,775 was.

recovered after trial by jury, and £352,688 after trial without jury. The amount recovered in the county courts was £1,817,462. In the year 1823, which is the earliest year to have satisfactory records, 63,241 actions were brought in the three common law courts. In the year 1899, 68,114 were brought in the Queen's Bench Division, but in that year there were 1,152,163 plaints issued in the county courts.

Early in the century there were 1,138 causes entered for trial at the assizes in England and Wales. The number of actions entered for trial at the assizes in 1899 was 1,141. The average annual number of actions from 1845 to 1849 was 1,543. Every English town which was an assize town a century ago is an assize town still, except Abingdon, Buckingham, Thetford, and Kingston; but the following towns have been added to the list: Ipswich, Birmingham, Manchester, Liverpool, and Leeds. In the year 1899 no actions were entered at four of the assize towns, five causes and under were entered at twenty-four of the assize towns, and at sixteen of such towns that has been the case for the past six years. Of the 1,141 causes entered for trial, 990 were entered on five of the circuits, and 151 on the other four circuits. Of the entire 1,141, 843 were tried or otherwise disposed of in court. The number of prisoners committed for trial at the assizes and quarter sessions of England and Wales in 1899 was 10,532. Of these 7,432 were tried at quarter sessions, 905 at the Central Criminal Court, and 2,565 at the assizes. At five of the county assizes the total number of prisoners for trial was 100. The number of commission days, exclusive of those commission days on which actions or prisoners were tried, was 139, and the annual average since 1895 of these useless commission days has been 135 days per annum. The total amount recovered in the 843 actions tried or disposed of at the assizes was £118,698.

A serious question that arises in connection with the county court system is imprisonment for debt. The number of persons committed by county court judges in the year 1899 was 7,864; in 1898, 7,803; and in 1897, 7,727. The attention of Parliament has been frequently called, and will, I have no doubt, be called again to this widely extended system of imprisonment for debt. Its modification, not to say its abolition, might, no doubt, to some extent affect the credit of the people, who would not be trusted if

there was no power for imprisoning them for the non-payment of their debts. There are those who think that the reduction of the credit system would be a boon instead of an injury to the working man, but it is an anomaly that the penalties of those who do not pay small debts should so strikingly contrast with the treatment of the insolvents of a greater magnitude who not only evade the payment of their debts, but also the consequences which have been devised for preventing the wholesale defrauding. County courts have stood the test of half a century. Originally regarded as a debt-collecting agency, they have by the extension of jurisdiction which Parliament has conferred upon them, emphatically become tribunals for bringing within the reach of the masses and to their very doors justice year by year. As vacancies have occurred on the County Court Bench, men of high standing, long experience and eminent judicial ability have been appointed to be County Court judges. I am not surprised that one of the legal newspapers a year or two ago said: "In view of the deadlock so frequently occurring in the Queen's Bench Division, the absolute failure of the assize system and the hopelessness of any reform, we have come to the conclusion that the profession will do wisely to direct its energies to placing County Courts upon a satisfactory footing, with a view to the great bulk of the common law business of the country being done in those tribunals."

While we record changes in the law, we must not overlook changes in those by whom the law has been practised and justice administered. In 1800 there were 598 barristers-at-law, of whom twenty-five were King's Counsel, seventeen serjeants-at-law, and 556 juniors, and there were 172 special pleaders, conveyancers and equity draughtsmen not called to the bar, and 4,969 attorneys, solicitors, and proctors. In 1900 there were 9,457 barristers, of whom 245 were King's Counsel, and 9,212 juniors, and four special pleaders and conveyancers not called to the Bar; and the number of solicitors exceeded 16,000. In 1800 there were twelve common law judges and two equity judges. In 1900 there were fifteen judges of the Queen's Bench Division, seven judges of the Chancery Division, two judges of the Probate Division, five lords justices and four lords of appeal. In 1800 there was no special legal education for barrister or solicitor, and no examinations prior to their being admitted to the practice of their profession. Now

no one can be called to the bar or admitted as a solicitor without passing severe and testing examinations in both law and practice. There is still room for improvement in the legal education of law students of both branches of the profession.

REVIEWS.

The Yearly Digest of Reported Cases for 1901, By Edward Beal; published by Messrs. Butterworth & Co., 12 Bell-yard, Temple Bar W. C., London. Price 15s.

The Annual Digest for 1901, By John Mews; published by Messrs. Sweet and Maxwell, 3 Chancery Lane, London.

There is hardly anything to choose between the two Digests. There are minor differences of arrangement between the two publications, but they are both equally useful and equally well prepared. But the number of cases digested appears to be larger in Mr. Beal's Digest, for while the list of cases digested occupies only thirteen pages in Mr. Mews' book, it occupies about twenty-five pages in Mr. Beal's Digest. We notice also that the Indian decisions of the Judicial Committee are digested in Mr. Beal's Digest.

Best on Evidence, 9th edition, by J. M. Lely published by Messrs. Sweet and Maxwell, 3 Chancery Lane, London; price 25s.

A standard book like Mr. Best's Treatise on Evidence requires no recommendation. The changes in the law introduced by the Criminal Evidence Act, 1898, and other changes have all been carefully noticed, and the book has been thoroughly revised and brought up to date. The omission of the American notes of Mr. Chamberlain is a matter of some regret. We have no doubt that the new Edition will be as popular to law students and the profession in this country as its predecessors.

The Law relating to Cheques by P. R. Watson published by Messrs. Sweet and Maxwell, 3 Chancery Lane, W. C. London; price 3s.

This is an excellent hand-book upon the law of cheques. The law is enunciated in a series of rules accompanied by notes and

comments. A thoughtful and a critical book, as a careful and compendium of the law, it deserves the appreciation of bankers and lawyers.

We beg to acknowledge receipt of the following publications :—

Calcutta Weekly Notes	for	..	April.
Columbia Law Review	"	...	do.
Green Bag	"	...	do.
Kayastha Samasahar	"	...	do.
Canadian Law Times	"	...	do.
The Law Magazine and Review,,	"	..	March.
Virginia Law Register	"	...	April.
Law Magazine and Review	"	..	March.
Case and Comment	"	.	do.
Indian Review	"	..	April.
The Bombay Law Reporter	"	.	do.
The Law Students' Helper	"	...	do.
The Lawyer	"	..	do.
Punjab Law Reporter	"	..	do.
The Australian Law Times	"	.	do.
Canada Law Journal	"	..	do.
The Law Students' Journal	"	...	do.
The Kathiawar Law Reports	"	..	do.
The Digest	"	...	do.
Burmah Law Reports	"	...	March.
General Digest	"	...	do.
Harvard Law Review	"	..	April.
Law Notes	"	..	do.
American Lawyer	"	...	do.



SOME PROBLEMS IN THE HINDU LAW. OF ADOPTION.

I.

The decision of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*¹ as regards the validity of the adoption of an only son sets at rest one of the vexed questions of Hindu Law which has divided the British Courts in India almost from their very commencement. It is to be hoped that this satisfactory termination of a long controversy may not give rise to other points of difficulty in the interpretation of the Hindu Law. One such question for which there was perhaps not much scope until the validity of an adoption of an only son was put upon a safe footing is the adoption of an adopted son. It is rarely indeed that a son is born to the adoptive parents after an adoption and, therefore, there is hardly any possibility arising of the giving of that adopted son again in adoption to another. Perhaps it is difficult to say that there is more likelihood now of the question arising because the adoption of an only son has been declared valid. The adopted son, however, will generally be the only son of his adoptive parents; and if they are not particularly burdened with religious considerations, it is not impossible to suppose that the son they have adopted may be given away in adoption to another. If the law would sanction such a course in consideration of worldly advantages to the boy himself and the givers, we should probably be strictly correct in saying that there is more chance of such a question arising after the pronouncement by the Judicial Committee of the validity of an only son's adoption. To the ordinary student of law, looking at its scientific development on logical lines, there may be nothing wrong in the adoption of an adopted son. The average lawyer accustomed to carry out principles to their logical conclusions will say that the adopted son has taken the place of the

(1) I. L. R., 22 M. 398.

natural son; he is entitled to inherit to the adoptive parents, to collaterals and cognates. The adoptive parents, collaterals and cognates inherit to him; he has pollution in the adoptive family; and he cannot marry in it within the same degrees as the natural son. He has, therefore, in every respect the rights and obligations of the natural son; and, therefore, he may be given in adoption as a natural son. But the student of legal history knows that the development of law is not always logical. It was observed by the Lord Chancellor in *Quinn v. Leatham*¹: "I entirely deny that a case can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code whereas every lawyer must acknowledge that the law is not always logical at all." These observations are as true of the Hindu Law as of the Common Law of England with reference to which they were made. They do not say, and we think, the Lord Chancellor did not intend to lay down, that the application of principles to new sets of circumstances, not within the purview of the language in which those principles were expressed, does not involve the process of logical reasoning. The protest made by the Lord Chancellor was against the common habit of supposing that all parts of the law contribute to make a harmonious whole. We are inclined to think that, notwithstanding the circumstance of the adopted son filling in all respects the position of a natural son, he cannot be dealt with by the adoptive parents as the subject of a further gift in adoption like a natural son whether a son is born subsequent to the adoption or he remains the only son of the adoptive parents. We think it may safely be laid down, having regard to the reason of the law on the subject that the adopted son may not be given away in adoption. The texts of Vasishta² Chap. XV, verses 1 and 2, are among the principal sources of the law of adoption. Baudhayana³ lays down the same rules in the Parisishta verses 2 and 3. The right of the father and the mother to give in adoption is based on the circumstance of the procreation of the child by them. The maternal grandfather cannot give⁴. A step-mother has no power to give⁵. These have no

(1) [1901] A. O. p. 495 at p. 506.

(4) Vide *The Collector of Surat v.*

(2) Sacred Books of the East, Vol. XIV, p. 75.

Dhirsingji Vaghbaji, 10 B. H. C. R., 235 and Mayne, p. 165.

(3) Sacred Books of the East, Vol. XIV, p. 334.

(5) *Papamma v. Appa Rau*, (1896) I. L. R., 16 M. 884.

power to give because the ground of qualification is absent in their case. They have not procreated the son. These texts of Vasishtha and Baudhayana are cited with approval and followed in treatises like the Dattaka Mimamsa IV, 14, the Dattaka Chandrika, S. 1, pl. 27, 29 and 31, the Mitakshara Chap. I, S. 11, pl. 9, the Vyavahara Mayukha, S. 5, pl. 16, and the Smriti Chandrika Ch. X, pl. 4 (3). It is a rule of the Mimamsa which is always acted upon in the interpretation of the Smriti law that if words can be understood in their primary sense, they should not be understood in a secondary sense. This applies to the texts of the sages. So also Manu, Ch. IX, verse 168, which says that "a father or mother may give" must be understood to refer to father and mother in the primary sense of those words and not in their secondary sense of adoptive father and adoptive mother. 'Mother' can mean a step-mother only in a secondary sense and, therefore, a step-mother cannot be meant by the text authorizing a mother to give. It is on the same principle that the text of the law entitling the mother to inherit to the son is not understood to include the step-mother. It follows, therefore, from the well understood principles of interpretation that an adopted son cannot be further given in adoption by the adoptive father or mother on the authority of the text authorizing the father and mother to give. Again, the very same texts already referred to authorizing the adoption of a son must be understood to sanction the adoption of an *aurasa* or primary son, and not of an adopted or secondary son. The word *son* should be interpreted in its primary sense in the same manner in which the words '*father*' and '*mother*' were interpreted. It follows from this principle of interpretation that none but an *aurasa* son may be taken in adoption.

II.

Another question on which the Sages and the Commentators have not pronounced any opinion is, whether a person having a son born may give him away in adoption and afterwards take one in adoption himself. Such a contingency is not perhaps likely to occur. If a man is anxious to have a son from a temporal point of view, he is not likely to give away the son he has and take another instead. But it is not impossible he may do so. He

may get a large pecuniary advantage by giving the son he has, and that may dictate conduct otherwise unlikely.

It is clear law that a sonless person may adopt. The "distress" of Manu has come to signify merely the absence of a son. The son in the above clause includes grandson and great-grandson, the reason being the capacity of any of them to give the ancestor the full benefit of the funeral oblations. A person is sonless within the meaning of the rule when the son is disqualified to give funeral oblations; and disqualification may be by reason of some congenital defects, or when the son becomes an outcast or a Christian or Mahomedan and, therefore, 'degraded'.¹ Nanda Pandita in his "Dattaka Mimamsa" (II, 762) holds that a person may adopt when the son born is disqualified by reason of impotence etc.² It follows from the above cases of capacity to adopt notwithstanding the physical existence of a son, that where such son has been given in adoption, another may be adopted; because the reason of the incapacity to offer funeral oblations and to inherit subsists in both classes of cases. It is true that under the religious law an adopted son should perform the funeral rites and offer oblations in respect of the natural father in the absence of son, grandson and great-grandson, and it may be, of others like the widow and the daughter's son. It may also be that the adopted son is entitled in the last resort to inherit in his natural family in the absence of persons better qualified to inherit. These are points on which there has been no judicial pronouncement,³ though the extreme generality of the language used in cases which did not raise the question may seem to throw doubt upon them. There is authority in the Hindu treatises for the adopted son's capacity to offer oblations and to inherit in his natural family; his exact place in the order not being definitely specified⁴. But we do not think that this remote capacity can affect the question of the right of the father to take a boy in adoption after giving away the son he has. For the capacity of the adopted son to offer oblations and to inherit is of the highest order; and a person is entitled to secure such a son for his spiritual and temporal benefit. Nor do we think any im-

(1) See Sirkar, pp. 196 and 197.

(3) But see *Rajagopala Tevar v.*

(2) See Strange's H. L. Vol I, p. 77; *Sundara Nachiar*, 12 M. L. J. R. 64.

(2) Wm. Macnaughten 200; Steele 42-131;

Mayne's H. L., p. 135.

(4) See *Vaidyanatha Dikshatrayam*,

Gradda a Kanda.

portance can be attached to the circumstance that the father voluntarily makes himself sonless by giving him away while in the other cases of disqualification of the natural son the incapacity of the son to satisfy the requirements of the religious law is not the result of the father's action. We are, therefore, inclined to think that the Hindu who has given away his natural son in adoption may adopt another.

HINDU AND MAHOMEDAN RELIGIOUS ENDOWMENTS.

III.

Constitution and proof—Dedication.

We shall now consider how and in what different ways religious endowments may be constituted. In this connection the first question that arises is, whether there is a dedication, and, if so, whether there is a real or apparent dedication. Indeed the two questions are one and the same, and an answer to the one will serve the other equally.

The onus lies on the party who sets up the case that the property has been inalienably conferred upon an idol to sustain its worship to prove such case. Very strong and clear evidence of such an endowment ought to exist¹. And so in a suit by a shebait to recover possession of properties as endowed, it is on the plaintiff to prove the title which gives him the right to recover possession of the property just as it would be if he were seeking to recover upon a secular, instead of a quasi-religious title². In *Venkateswara Iyer v. Shekari Varma*,³ the Privy Council held that the plaintiff, the Valiya Raja of Palghat, suing the defendant to recover certain lands perpetually demised by his predecessors in title on the ground that the perpetual lease or demise to the defendant's ancestor was not binding as the property comprised under the lease was alleged to belong to 4 devaswoms, must shew that such properties were in fact Devaswom (the burden of proof lying upon him), and when no attempt was made to show when, by whom, or in what way the land was dedicated to them (Devaswoms), nor at what time they had actual enjoyment of it, the plaintiffs' suit must be dismissed. If a trust for a religious endowment is once

(1) *Konwar Doorganath Roy v. Murd Pandah v. Gyaadur*, 10 Ram Chunder Sen, (1876) I. L. R., 2 C., p. W. R., (C. R.) 89.
341 (P. C.) (3) I. L. R., 3 M. 384 at pp. 396 and 398.

established, it is on the party who alleged that it has become ordinary property (which can only be in the case of private religious trusts) to show that there has been some subsequent legal conversion of the lands to the ordinary uses of property¹.

An *apparent* as opposed to *real* dedication consists in the ostensible title to certain property remaining with the idol or religious foundation, while in fact the latter has none and the person who is said to be the author of the apparent dedication remains the real owner. If the endowment therefore is merely *nominal* and is not *bona fide*, the property will not be treated as set apart for religious purposes².

A case of an apparent dedication arises where the property is purchased in the name of an idol, but is enjoyed by the person who advanced the money, and is neither really intended to be devoted to the idol nor is intended to be a gift to the idol. In such a case though the property is taken or purchased in the name of the idol, it is merely a benami transaction. The person who is the real owner is the person who advanced the money.

In *Gopeekrist Gossain v. Gungapersaud Gossain*,³ the Privy Council held that where a Hindoo purchases property in the name of his son, the property is not vested in the son, but remains vested in the father who, has paid the consideration, the English theory of advancement not obtaining in India either in the case of Hindoos or Mahomedans. This principle was held by the Privy Council to be also to be applicable to the case of an idol in *Maharanee Brojosoondery Debea v. Ranee Luchmee Koonwaree*⁴ where the facts were that one Maharaja Ramnath bought property (a certain Zemindary in Rajshahye Zilla) in the name of an idol (named Sham Soonder Thakoor) kept in his family house, but dealt with the funds or income of the Zemindary as his own property. The Privy Council in holding that the transaction was only benami

(1) *Juggut Mohini Dossee v. Mussu-mat Sokheemoney Dossee*, 14 M. I. A., p. 289 (303). (3) (1854) 6 M. I. A., p. 53 (S. C.) 4 W. R. (P. C.) 46.

(2) *Juggernath Roy Chowdhry v. Kishen Pershad Barmah*, 7 W. R., C. R. 66. (4) 15 B. L. R., 176 (note), (S. C.) 20 W. R. (P. C.) 95.

or nominal, and that the principle of benami purchases enunciated in *Gossain v. Gossain*¹ applied to the case of an idol, observed, "If a man merely purchases property in the name of his own idol, whom no one, except himself, has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased."

It is now too late to question the benami doctrine enunciated by the Judicial Committee so long ago as 1854 in *Gossain's case*² and re-affirmed in more cases than one³ by that august tribunal especially when it is remembered that the doctrine has received legislative sanction in sections 81 and 82 of the Indian Trusts Act (II of 1882). It is unfortunate that even the admitted exceptions to this doctrine obtaining in England⁴ should not be held applicable in India. Whether these exceptions are not held applicable in this country either because the principles founded on them are opposed to natural justice or because they are inconsistent with some supposed theory said to obtain in the Hindu Law regarding the propriety of making unequal distribution, it is at least open to grave doubt whether the mere fact of the purchase money having been advanced by another is of itself sufficient to show that the purchase is really intended for such person when the person in whose name the conveyance has been taken is either the wife or son of the person advancing the money. At any rate the fact of the person in whose name the conveyance appears standing in such relationship (or as it is called in *loco parentis*) is a

(1) 6 M. I. A., 53 *supra*.

(2) If the case of *Dhurm Das* (1887) L. R. 15 I. A. 29 (S. C.) I. L. R. 10 A. 197; *Nawab Ibrahim Ali Khan v. Pandeey v. Mussumat Shama Soondari* 10 A. 197; *Nawab Ibrahim Ali Khan v. Debiak*, (1843) 3 M. I. A. 229 be also taken into consideration it will be 1843 really.

(3) *Lokhes Narain Roy Chowdhry v. Kalypuddo Bandopadhyay*, (1875) L. R. 2 I. A. 154; *Dharam Kant Lahtri Chowdhry v. Kristo Kumari Chowdhryani*, (1886) L. R. 13 I. A. 70; *Imambandi Begum v. Kamleswarai Pershad*, (1886) L. R. 13 I. A. 180; *Umam Pershad v. Gandharp Singh*, (1887) L. R. 14 I. A. 127; *Mussamat Thakro v. Ganga Pershad* (1887) L. R. 15 I. A. 29 (S. C.) I. L. R. 10 A. 197; *Nawab Ibrahim Ali Khan v. Ummatal Zohra*, (1896) L. R. 24 I. A. 4; *Prince Suleman Kadar Bahadur v. Nawab Meludi*, (1897) L. R. 25 I. A. 15; *Muhammad Imam Ali Khan v. Sardar Hussain*, (1898) L. R. 25 I. A. 161; and *Pandit Ram Narain v. Maulvi Muhammad Hadi*, (1898) L. R. 26 I. A. 83.

(4) See *In re A Policy No. 6402 of the Scottish Equitable Life Assurance Society* (1902) 1 Ch. 282 for the latest pronouncement of the law on this subject.

circumstance from which it may be inferred that the transaction is intended for the benefit of the transferee (or other person in whose name the conveyance is taken) and the *onus* is upon the person asserting the transaction to be *benami* to prove his case. This view is confirmed by the wording of sections 81 and 82 of the Trusts Act and by illustration (d) to section 81.

In the case of wives, children and other persons similarly circumstanced there is a motive in people intending to give a beneficial interest in property transferred to them or taken in their names. In India the motives of the people in making gifts to idols, temples or other religious establishments are stronger than in England. In *Thackersey Dewraj v. Hurbhum Nursey*,¹ Scott, J. observed "It is also to be borne in mind that the orthodox Hindu, whether Jain or Brahminical in his faith, has a stronger motive for charity than an Englishman. The desire to perpetuate a name or to render some great service to his fellow creatures has been the chief cause of great public charitable gifts in the West. The propitiation of heaven may also have been an object, but it is only a secondary one. But here in India the importance of the motives is reversed." These observations receive ample support from the case of *Surendro Keshab Roy v. Doorga Soondery Dossee*,² where in considering the question whether there was an absolute dedication of certain property to the idol or there was only a charge or trust in favor of the idol with a beneficial interest in the surplus to the trustee or donee, their Lordships observed "The testator shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, i. e., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakoors whom he venerates most. But the effect when the estate is large is to have some beneficial interest undisposed of." In such cases, therefore, we must look to the intention as expressed in the document prompted as it is by the strong motives already described and regard the transaction as not *benami* unless the party asserting the contrary is able to prove his assertion by circumstances. Indeed "courts could act only on public acts of parties, and purchasers have a right to bind parties by such public acts. Courts ought not to credit

(1) (1884) I. L. R., 8 B. 482 at p. 451. (2) (1892) I. L. R., 19 C. (P. C.) 513.

readily • assertions of hidden and fraudulent intentions which made today for one purpose may be abandoned or denied tomorrow for the assertion of another and inconsistent purpose”¹.

• A frequent case of an apparent dedication is to be found in the case of settlements made by Mohammedans in the nature of *wakfs*. For, one feature of Mohammedan settlements is the prominence given by the settlor for the aggrandisement of the family. To a Mohammedan mind, settlements made to the family are but natural. An anxiety to keep the family above want and the preservation of the family prestige by tying down the property in the family, are the prime considerations guiding a Mohammedan. The family is the first object of charity. In fact it is the settlor’s chief solicitude to keep the family always in an influential position and at any rate out of poverty. As the Privy Council observed quite recently:² “The theory...seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose,” and they added “it is superfluous in the present day to say that this is not the law.” Hence it has been held that where there has been no substantial dedication to *wakf*, but the object is, in the guise of a *wakf*, to tie up the property perpetually in the family, the whole settlement is invalid. Where, therefore, there has been no substantial dedication of the property for religious and charitable uses, but the settlor uses the form of a *wakf* as a veil, under cover of which he attempts to aggrandise the family, it has been held in a series of cases that the settlor is attempting to do what the law does not permit him to do openly and that, therefore, effect cannot be given to the transaction³.

It may be said that in the case where a person gives the whole of his property to charity or an idol (as is frequently the case

(1) *Sraemutty Sokhemoney Dossee v. Mohendro Nath Dutt*, 4 B. L. R. (P. C.) 16, (S. C.) 13 W. R. (P. C.) 14.

(2) *Mujib-un-nissa v. Abdur Rahim*, (1900) L. R., 28 I. A. 15 S. C. I. L. R., 23 A. 233 at 245. •

(3) See *Sheik Mahomed Ahsan-ul-la Chowdhry v. Amarchand Kundu*, (1889), L. R., 17 I. A. 28 S. C. I. L. R., 17 C. 408 *Abdul Gafar v. Nisamudin*, (1892), L. R. 19 I. A. 170 S. C. I. L. R., 17 B. 1; and *Mujib-un-nissa v. Abdur Rahim*, (1900), L. R., 28 I. A. 15 S. C. I. L. R., 23 A. 233.

in wills, &c., made by Bēngalis) a question of apparent dedication also arises. It is possible that such a question may arise. Unless of course it can be shewn that the whole thing is a nominal transaction and that the transaction is not what it purports to be or unless the testator has done it in mere jest or has been deceived or has not understood the nature and effect of the transaction, it cannot be said that a gift or devise of the whole of a man's property to an idol or charity cannot be given effect to. If the donor is an idiot or is weak-minded and advantage is taken of his position, the gift or devise of his whole property may be said to be proof of such weak-mindedness or idiocy. Otherwise it cannot be seen why effect should not be given to the transaction. Of course though an endowment may be found to have been established, where the nature and extent of the endowment itself is in question and a gift of all the owner's property (declared orally at his death) is alleged, strong proof of the same is required¹.

The last case of an apparent dedication arises where the donor in order to defeat his creditors disposes of the whole or other substantial part of his property to an idol or charity. In this case it may have been intended at the time by the donor that no effect ought to be given to the endowment at all but merely that the transaction should operate as a nominal transaction in order to prevent property from being attached by his creditors. In such a case, of course, there is no endowment in fact². In *Ramchandra Mukerjee v. Ranjit Singh*³, it was observed by the Calcutta High Court that "Where a deed of endowment is made to defeat the claims of creditors, it is not valid and can only be treated as nominal and colorable." This is, however, stating the proposition too broadly. For it may have been intended by the donor at the time to operate as a real transaction, but the effect of it may be to operate to delay or to hinder creditors. In such a case the transaction is voidable as against creditors. For an idol being a mere volunteer, such a gift will not be valid as against creditors⁴. Of course

(1) *Bypro Pershad v. Mussamet Kinae Dossie*, 3 W. R., (C. R.) 165.

Dossee v. Mohendromath Dutt, 13 W. R. (P. C.) 14 S. C. 4 B. L. R. (P. C.) 16.

(2) *Jaggernath Roy Chowdhry v. Kishen Persad Surmah*, 7 W. R., (C. R.) 266; and *Sreemuty Sookheemoney*

(3) I. L. R., 27 C., p. 242.

(4) (Vide *Soohikishore Bundopadhyay v. Rancee Chooramoney Putlo Mahadebes*, W. R., (1864) (C. R.) 107,

where a person has got ample property and has also debts and devotes some property to charity or an idol, the fact that he has debts will not vitiate the transaction if the remainder of the property still possessed by the donor is amply sufficient to satisfy the claims of the creditors. Thus in *Deoki Prasad v. Inayat-ullah*,¹ it was held by the Allahabad High Court that where a settlor had other property besides that settled in *wakf*, enough to pay the creditors, their existence did not incapacitate him from making a gift of the portion of the property as *wakf*.

Where the dedication is a fact and is clearly proved, a mere suspicion that the deed, giving property to an idol, may have been executed with the object of defeating creditors or may possibly affect some future creditors or claimants, will not invalidate the gift. Thus in *Radha Mohun Mondul v. Jadoomonee Dossee*,² the facts were that the plaintiff as widow and heiress of her husband sued for a share of certain property, some of which (a Talooka, certain Government pro-notes for 2 lakhs and odd and certain other Government pro-notes for 14,000 Rs.) she claimed in her right as the heiress of her husband and as appertaining to his estate, while the rest she claimed as the joint shebait of certain idols, being debuttur property. The Sub-Judge gave the plaintiff a decree as regards some of the debuttur lands claimed by her and also awarded possession of her share in Government pro-notes for Rs. 14,000, provided she furnished security for the latter against waste. As regards her claim for the Talooka and the Government pro-notes for 2 lakhs and odd, the Sub-Judge held that such property did not appertain to the family estate, but was *debuttur* property belonging to the idol Sreedhur, and that as plaintiff's suit was not framed in this way he could not give her a decree in her right as shebait. On appeal the High Court held that the objection of the Sub-Judge (*viz.*, that the plaintiff only claimed in her own personal right) for refusing to give relief to plaintiff on the findings come to by him was one of form rather than of substance, and that the plaintiff would be entitled to relief as shebait if the property were found to be *debuttur*. A decree for the Talooka was given, but the High

(1) I. L. R., 14 A. 375.

(2) 23 W. R. (P. C.) 869.

Court held, however, that the agreement among the members of the family constituting 2 lakhs and odd Government pro-notes as debuttur was not valid as it was fraudulent and collusive to defeat the rights of some widows of the family. The Privy Council agreed with the Subordinate Judge on the question of fact while concurring with the High Court that the objection taken by the Subordinate Judge was one of form rather than of substance, which, therefore, ought not to be allowed to prevail and held that the agreement being in fact executed and there being no question raised as to its genuineness, and the same having been acted upon for a long time, and there being accounts (which were produced) relating to its application in pursuance of the agreement, and a temple also having been in fact built for the idol at great cost, the arrangement evidenced by the agreement was a real transaction and as such valid, and it must, therefore, be given effect to. Their Lordships observed : "The mere suggestion that the amount set aside was an exorbitant amount, and that there might possibly have been some intention to defraud widows or other persons is not enough to outweigh the evidence of conduct. It is not upon mere speculations of this sort that an agreement proved by evidence so strong to have been not merely executed, but acted upon for a number of years can in their Lordship's judgment be properly set aside."

It is now enacted by section 53 of the Transfer of Property Act (IV of 1882) that "Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid. Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration." Section 2, cl. (d) of the same Act enacts that "nothing in the 2nd chapter of this Act shall be deemed to affect any rule of Hindu, Mohammedan, or Buddhist Law." Section 53 is in the 2nd

chapter and there is no rule of Hindu, Mohammedan or Buddhist Law that lays down anything contrary to the principle enunciated in the section. In *Abdul Hye v. Mir Mahomed Mozaffar Hussein*,¹ the Privy Council held that the principles laid down in 13 Elizabeth ch. V were given effect to by the High Courts of India and properly guided their decisions in administering law according to equity and good conscience. It, therefore, follows that section 53 of the Transfer of Property Act applies to all gifts made by a Hindu donor in favor of an idol or by a Mohammedan donor in the nature of wakfs.

There are several tests laid down in the cases to see whether a transaction which purports to be a religious endowment is real or nominal. From the several tests to be presently mentioned it will be seen how difficult it is to lay down general rules on a question of fact which must more or less be left to be decided by each court upon a consideration of the circumstances of each case. One strong test in considering whether an endowment is *bona fide* or *nominal*, is to see how the property has been enjoyed and how its income has been utilised, or how the founder himself and his descendants have dealt with the same². The manner in which the property is held and enjoyed is always an important point for consideration. Thus in *Ramchandra Mukerjee v. Ranjit Singh*,³ the Calcutta High Court in finding that the properties in question were not debuttar, there being only a nominal or colorable dedication, observed, "In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held and enjoyed is the most important point for consideration. Now, in the present case there is no reliable and sufficient evidence to show how, during the few months for which the donor lived after the dedication, the income of the properties in dispute was spent; nor is there any such evidence in respect of any period subsequent to his death. It is true there is some vague oral evidence that Rani Anandamoyi all along performed the worship of the idol.....but the idol being a family idol, she would perform its worship, as every Hindu does, whether there is

(1). L. R. 11, I. A. p. 10 at pp. 17
and 18: S. C. I. L. R. 10 C. 616.

(3). (1899), I. L. R., 27 C. 242.

(2). *Ganga Narain Sircar v. Brindaban Chanderkur Chowdhry*, 8, W. R. (C. R.) 142.

any endowment in favour of the idol or not." If no accounts which every rich and respectable donor will be expected to have, are produced showing how the income of the properties in dispute has been spent that will throw great suspicion on the factum of dedication. For aught it may be the income may have gone into the general accounts relating to the estates of the family¹.

Where, however, accounts are produced showing that rents have been separately collected and applied for the worship of the idol, it is some evidence of a prior endowment² and where there is good evidence going back for more than half a century that certain land has been given to an idol, proof that from that time the proceeds have been so expended will be strong corroborative evidence of such gift³. On this principle, the Privy Council upheld an agreement by which a certain Hindu family endowed for its idol Government paper worth two lakhs odd finding that the agreement was in fact executed, that the same had been acted upon for a long time and that accounts were produced relating to the application of the interest accruing on the same in pursuance of the agreement⁴.

The application of rents for the purposes of the endowment and accounts produced to show such application can only be relevant as evidence showing the conduct of the donor or his family,⁴ and as such may be negatived by the conduct of the donor or his family in claiming a partition of the property or otherwise treating it as separate property¹.

Of course where the dedication is otherwise clearly proved and there is in fact an endowment, mere breach of trust on the part of the donor or trustee in not applying the income of the trust property for the purposes of the trust would not invalidate the trust or alter the original nature of the grant⁵. But where

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| <p>(1) <i>Konwar Doorganath Roy v. Ram Cunder Sen</i>, I. L. R., 2 O. (P. Q.) 341 and <i>Ram Chandra Mukerjee v. Ranjit Singh</i>, I. L. R. 27 C. 242.</p> <p>(2) <i>Muddina Lal v. Streemutty Komul Bibee</i>, 8 W. R. C. R. 42.</p> <p>(3) <i>Rādha Mahun Mohdu v. Jadoomoney Dossee</i>, 23 W. R. C. R. (P. C.) 389.</p> <p>(4) See cases cited in notes (1) and (3).</p> | <p>(5) <i>Mudden Lal v. Streemutty Komul Bibee</i>, 8 W. R. C. R. 42; <i>Juggut Mohini Dossee v. Mussunat Sokheemoney Dossee</i>, 14 M. I. A. p. 289; <i>Lutchmiput Singh v. Amir Alum</i>, I. L. R., 9. O. 176; <i>Girijanund Dattajha v. Saila Janund Dattajhy</i>, I. L. R., 23 C. 645; <i>Ramchandra Mukirji v. Ranjit Singh</i>, I. L. R., 27 C. 242 at pp. 251 and 252; and <i>Suppammal v. The Collector of Tanjore</i>, I. L. R., 12 M. 387.</p> |
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the question to be determined is whether certain property is trust property or belongs to the trustee in his own right, instances of appropriation by the alleged trustee to his own use, if they are numerous and extend for a long period, will be good evidence of his right, but if the instances are recent or are occasional, they are of no value and will be treated as mere abuses of trust¹. In *Juggut Mohinee Dossee v. Mussumat Sokhemoney Dossee*², the Privy Council observed at pp. 306 and 307. "A former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as shebait. The court would not with any propriety say, 'we will decline to protect the property' and 'leave it further exposed to loss' and decline to make a declaration that it was trust property, merely because they would not trust the plaintiff with its administration."

If there is only a paper dedication and there is no evidence that the income has been utilised for the idol or, on the contrary, there is evidence that the income has been utilised by the appropriator himself, and the latter purports to deal with the property as his own, then the endowments cannot be said to be real³; and if it is shown that at the time of the paper dedication the appropriator has heavy debts, it is almost conclusive to show that the real object is not the creation of any real and valid endowment but that the object is only, in the guise of a dedication to the idol, to defeat creditors⁴.

The mere fact of the proceeds of any lands being used for the support of an idol is no proof that these lands are debuttur and constitute an endowment for that purpose⁵. For, that by

(1) *Grijanund Dattajha v. Saila* (4) *Muddun Lal v. Sreemuthy Janund Dattajha*, I. L. R., 23 C. 645 at Komul Bibee, 8 W. R. O. R. 42, *Mussumut* p. 654; See also *Ramchandra Mukerjee v. Shurfoonissa v. Mussumut Koolscem*, 25 W. R. C. B. 446, 447.

(2) 14 M. L. A. p. 289.

(5). Vide *Konwar Doorganath Roy v.*

(3) *Suppammal v. The Collector of Ram Cunder Sen*, I. L. R., 2 O. (P. O.) Tanjore, I. L. R., 12 M. 387. (341).

itself does not constitute an endowment where previously there is none or where there is no proof of a prior endowment. The mere fact of using the income to the use of an idol is consistent with the case of no endowment. A person may give out of his personal funds some money to another person and may be in the habit of so giving for some continuous period, but that gives by itself no right of action to the donee to compel the donor to give for ever. If the donee be an idol, the position is exactly the same. Even if the person should pay to another from the proceeds of certain property of the former and is in the habit of so doing for a long time, no right of action is given to the person so receiving to compel the person paying to give for ever when in fact there is no gift of the property. It is just the same if the donee be an idol. In all such cases the contribution is voluntary and the person so contributing has at any time a right to stop it if he be so minded¹.

The principle upon which private chapels in England rest stand exactly on the same footing. A lord of the manor or any other who generally keeps, a private chapel in his own mansion or house is at full liberty to divert or otherwise use the chapel at his own sweet will and pleasure. Of course in England there is no such thing as a private charitable trust i. e., property cannot be so perpetually dedicated to a private chapel as to be inalienable. In fact, in England the rule against perpetuities will apply universally to all gifts unless the gift be to a public charitable purpose. We shall refer to this matter more fully hereafter. In India, of course, the rule is different. At any rate, the Hindu Law recognises a gift to a family idol and any property can be dedicated in perpetuity for the worship of the idol or other religious purpose so as to be inalienable. But where there is no such dedication, the effect is the same as that of a private chapel in England. The position is as has already been pointed out exactly the same when a person merely makes a payment to a charity or spends for an idol out of his income or

(1) See *Mudden Lal v. Brimuthy Shurfooniessa v. Mussamut Koolsoom*, 25 Komul Bibee, 8 W. R. C. R. 42 *Ram W. R. C. R. 446*, and *Ganapati Aiyar v. Pershad Doss Adhikaree v. Skeekun Doss Savitri Ammal*, I. L. R., 21 M. 10. *Adhikaree*, 18 W. R. C. R. 399, *Mussamut*

out of the income from a particular fund or property without dedicating the fund for the purpose¹. This principle is well enunciated by the Privy Council in *Mussamut Ameerunnisa Khanum v. Mussamut Ashrufoonissa*². There the facts were one Bekessonissa Begum owned large properties and among them, an Imambara. She was betrothed to her cousin but separated and lived with one Velayet Hussain as husband and wife. The latter used to style himself as Shahjada of the Imambara. The Privy Council held that "there was no existing Imambara in the sense of any place of worship which might be said to have its property belonging to it, as distinct from the ownership of the Begum, that it was a sort of lay Imambara, and that, although he may have called himself Shahjada, it was really more a title of honor which he had assumed or a nominal appointment of Shahjada than any *real status* which he had or anything which would put him in the position of a trustee for an Imambara as distinguished from any property which his wife had. The property of the Imambara belonged to the Begum as her other property would do."

The value or extent of the property endowed will sometimes be a material factor in considering whether there has been a real or apparent dedication. For instance, in the case of settlements made by Mohammedans in the nature of wakf, the test of finding whether there has been a substantial dedication of the property for wakf is to see whether the extent of the property given is large enough to meet the charitable and religious purposes mentioned in the settlement; but if it is inconsiderably small, then it will be regarded only as a veil under cover of which it is attempted to create a perpetuity in the family which the law will not allow³. In the case of settlements or endowments made for the purpose of defeating creditors, the test is rather the reverse. If the property conveyed for religious purposes is small and does not impair or diminish the rights or security of the creditors, the transaction may be regarded as real and may even be upheld as against creditors. But if the value or extent of the property conveyed is large or where a donor conveys away all his property for religious purposes

(1) *Mudden Lal v. Srimutty Komul Bibee, Ram Pershad Das Adikaree v. Skeekun Doss Adhikaree and Mussamut Shurfoonisa v. Mussamut Koolsoom, Supra.*

(2). 14 M. J. A. 433.

(3) See *Muhammad Munawar Ali v. Basulan Bibi*, I. L. R., 21 A. 329.

without making any provision even for his own maintenance, then surely his object is only to defeat the creditors and not to create a real transaction. Where, therefore, a deed purports to create a religious trust, but the transaction is not intended to be real or is a mere cloak under the pretence of a gift to the religious purpose (idol) for the aggrandisement of the family benefit, it cannot be enforced or given effect to¹.

The presence or absence of priests will also be a valuable test. Thus where no priests are employed for the worship of the family idol and the idol itself remains in the family house which may be sold away to strangers, it is some evidence to negative a regular endowment and the property will not be debuttur². In *Brojosoondery Debea's case*³ the Privy Council observed "This was not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple for the support of Brahmins, for the purpose of performing religious service for the benefit of any Hindu who might please to go there." The Privy Council followed an earlier case (*Madhub Chunder's case*)⁴ in which it was held that where an endowment was merely nominal and indications of personal appropriation and exercise of proprietary rights were found there was no endowment and a sale of property alleged to be endowed under such circumstances was valid. The above observations of the Judicial Committee, however, should be taken with the facts of that case and should not be taken as negating the existence of the numerous classes of cases frequently to be found in Bengal and Northern India, viz., those of private religious endowments, i. e., endowments in favor of family idols. Where, however, the idol has a temple of its own, the mere fact that no regular priests are appointed will not negative the endow-

(1). *Juggut Mohini Dossee v. Sokheemony Dossee*, 14 M. I. A., p. 289 at p. 302.

(3). 15 B. L. R. 176 (note) *Supra*.

(4). 5 S. D. A. 268.

(2). *Maharanes Bojosoondery Debea v. Rames Luchmee Koonwaras*, 15 B. L. R. 176 (Note) S. O. 20 W. R. (P. C.) 95; *Konwar Doorganath Roy v. Ram Cunder Sen*, I. L. R., 2 C. (P. C.) 341.

ment¹. For if a person be owner of an idol as shebait (which will be so in the case of private religious endowments in favour of family idols) he will be entitled to appoint anybody he likes to perform the puja, and even the fact that another and his ancestors have been allowed to perform it for a long period of time will create no right in his favour though if the idol is a public idol such fact will be evidence of an hereditary right to perform the worship. Even in the latter case (i. e., of a public idol) there may be no hereditary priests and the Dharmakarta may appoint any one he chooses to perform the worship of the idol. The existence of regular priests may be strong if not conclusive evidence of endowment, but the non-existence of regular priests ought not to be pressed much as negating the endowment, especially when there is other evidence of dedication.

The fact that the possession and management of the properties endowed by a family may have been transmitted from one of its members to another, no strangers having taken part in the management, is not inconsistent with its being an endowment. For the trusteeship may remain with the donor and his family by the constitution of the endowment².

If property is set apart for religious purposes that constitutes dedication and such property must be treated as partaking of a trust or religious endowment.³ There is of course a great difference between a testator saying that he sets apart property to provide an income for religious purposes, and his merely saying that the ceremonies which are to be paid out of the income shall be performed in the family dwelling house in which the idol is located. In the latter case it depends upon the intention of the testator to be gathered from the instrument and the surrounding circumstances to say whether such a gift of the income is really a gift of the corpus and is capable of being enforced.⁴

Before the Transfer of Property Act, documentary proof or a specific grant by deed was not necessary to establish an endowment⁵. For under the Hindu Law, a man may by mere word of mouth

(1). *Radha Mohun Mondul v. Jadoomones Dossee*, 28 W. R. (P. C.) 369.

(2). *Goosasen Coundawallee Bahoojee v. Gridhareesjee*, 3 Agra H. C. 226.

(3). *Ananth Nuth Day v. -A. B. Mackintosh*, 8 B. L. R. 60.

(4). *Vide Shook Moychunder Dass v. Manohari Dossee*, I. L. R. 7 C. 269.

(5). *Vide Muddun Lal v. Sreemutty Kumul Bibee*, 8 W. R. (O. R.) 44.

constitute an endowment. Thus West, J., in the famous *Banichod Temple case*¹ observed, "A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it." This dictum was approved of by the Calcutta High Court in *Bhuggobutty Prosano Sen v. Gooroo Prosano Sen*,² which was however a case of devise. *Sale, J.*, observed in this case, "Under Hindu Law, an idol, as symbolical of religious purposes, is capable of being endowed with property, but no express words of gift to such an idol in the shape of a trust or otherwise are required to create a valid dedication."

But now by the Transfer of Property Act, section 123, it is enacted that for the purpose of making a gift of immovable property, the transfer of property must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. The same section goes on to provide that "for the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered."

If the transaction creating a religious endowment should be treated and viewed as a trust, then section 123 of the Transfer of Property Act does not apply, and the Trusts Act not being applicable to public or private religious endowments, there is no provision in any express enactment requiring such transaction to be compulsorily evidenced by a writing registered. Of course if there is a writing to evidence the transaction, section 17 of the Registration Act requires such writing to be compulsorily registered. Otherwise the writing cannot be given in evidence. If the transaction should be viewed as a trust and there can be no doubt that endowments in favour of an idol are regarded as such, then there is no statutory provision requiring an endowment in favour of an idol to be compulsorily evidenced by a writing registered. In favor of this view, it may be said, that the policy of the Legislature and of Government in keeping a strict neutrality

(1) *Manohar Ganesh Tambekar v.* (2) *L. L. R.*, 25 C. 112.

Lakshmiram Govindram, *I. L. R.*, 12

B. 247.

over religious matters, and in not interfering with native religious endowments and the laws relating thereto may point to the conclusion that the Legislature never meant to interfere by a side-wind and in the guise of section 123 of the Transfer of Property Act to interfere with the Hindu Law relating to the mode of constituting religious endowments. On the other hand it may be observed in favor of the view that the transaction is a gift, that an idol or a religious establishment is regarded in the eye of law a fictitious person capable of holding property, symbolically though it may be, and that endowments in favor of idols, &c., should be regarded as gifts to a volunteer so that if the transaction is not complete the gift cannot be enforced. In this view it follows that a gift to an idol or religious establishment must be in writing registered under section 123 of the Transfer of Property Act. But there is no specific authority on the point.

Under the Hindu Law delivery of possession was not absolutely necessary to validate a gift of immoveable property, and hence such delivery would also not be necessary in the case of a gift to an idol or a religious establishment. The fact, therefore, that the donor remained in possession would not invalidate the gift to debuttur; especially when the gift was followed by mutation of names pursuant to its terms¹.

It may be pointed out that section 123 is made applicable notwithstanding that its provisions may contravene any provision of the Hindu Law, but the same is not said as regards Mohammedan Law. Hence the provisions of the Mohammedan Law relating to the mode of constituting property wakf are not affected. No deed is necessary, section 123 not applying. We shall advert to this matter later on.

If a trust has been once perfectly created, it cannot be defeated by any subsequent act of the donor² or by the retirement of the trustee from his office, or by the refusal of the trustee to accept the

(1) Vide *Ramchandra Mukerjee v. of possession for validating a gift of Ranjit Singh* (1899), I. L. R., 27 O. 242; immovable property was abrogated by in I. L. R. 14 O. 446 it was held that the Sec. 123.

(2) *Sir Jamsetji Jijibhai v. Sonabhai*, 3 B. H. C. O. C. J. 133.

office, or by the inability of the trustee to discharge his duties properly¹. But if the trust be imperfect, as where the donor having had an intention to create one contemplated some further act for its completion, courts will not raise a trust and there is no trust to be enforced².

Of course courts in this country should act in conformity with the practice of the English Courts of Chancery in carrying out charitable bequests, the Courts of Chancery departing from their ordinary rule in such cases and undertaking to see them carried into execution, however indefinite they might be³. But where a testator directs his brothers to give alms for his spiritual benefit according to their judgment, such a direction or bequest is vague and is void for uncertainty; for even the English Courts will not ascertain or undertake to enquire what giving of alms will or will not be for the testator's spiritual benefit⁴.

A gift to Government for such charitable and philanthropic purposes as it may think proper has been held to be good⁵, but a bequest by a testator that his property shall be disposed of in a pious and charitable way as his executors think proper is bad⁶. A gift to *Dharm* is held void⁷ as it embraces many objects of benevolence not recognised as charitable (such as giving feast to Brahmins). A gift to *Dharm* is regarded on the same footing as gifts to charitable and benevolent objects which are held void in England though gifts for charitable and religious purposes without the addition of the word 'benevolent' are there held valid⁷.

A bequest of immoveable property to certain of the testator's heirs subject to the trust for the maintenance of the worship of the

(1). *Banur Gartner v. Stephenson*, 3 Agra H. O. 321.

(2). *Sir Jamssetji Jijibhai v. Sonabhai* 2 B. H. C. O. C. J. 133, *Supra*.

(3). *Joseph Ezekiel Judah v. Aaron Hys Nussem Ezekiel Judah*, 5 B. L. R. (O. C. J.) 433.

(4). *Hari Dasi Devi v. The Secretary of State for India in Council*, I. L. R. 5 O. 228.

(5). *Nanalat Lallubhai v. Harlochand Jugushah*, I. L. R., 14 B 476, where, however, the point was not decided.

(6). *Vide Ganghi v. Avar Mulla*, 1 B. H. C. O. C. J. 71 and *Kuramisas Govindji v. Nudravamdas Purshottam*, I. L. R., 14 B. 482.

(7). *Baker v. Sutton*, Keen's Rep. 224 and *Townsend v. Claures*, 3 Hare 287.

family idols will be regarded as valid though no amount is fixed by the testator himself. Here the fund is pointed out and the provision satisfies the other requisites of a precatory trust. The court will enforce such provision and direct enquiry into the amount required for such expenses¹. The court will be guided in such enquiry by the amount usually expended by the testator in such matters. That will be a reasonable amount to be fixed². Where, however, a testator bequeaths his property to his 3 sons in trust, so that the latter should out of the rents and profits after payment of expenses of management perform and celebrate the Doorgapujah and the Kalipuja and other religious ceremonies and festivals and the worship of the family idol at an expense and on a style the testator usually was doing and that the surplus should go for the maintenance of his 5 sons, it was held by Wilson, J. in *Chandramoney Dossee v. Motilal Mullick*,³ that such bequest was void for uncertainty the object of the testator being only to establish a permanent endowment for the testator's benefit and the so called religious trusts being only trusts for their worship and perpetual trusts for the family and not gifts to idols or to charity.

These are all cases known to the English Chancery Law as precatory trusts and the principle of these decisions have been followed in India. The principle laid down in the English cases is that a court of equity cannot act when there is only a power given to the executors or other persons generally to do certain things which they refuse to exercise⁴, but if the power is coupled with a trust then courts of equity will enforce such a power coupled with a trust⁵. A trust is not created unless the words are imperative, and the subject and objects are certain⁶. It was, therefore, held in the Madras case⁷ that where a testator directed that

(1). *Kally Prosonno Mitter v. Gopee Nathkur*, 7 C. L. R., 241, and *Ashutosh Dutt v. Doorgachurn Chatterjee*, L. R. 6 I. A. 182, S. C. I. L. R., 5 C. (P. C.) 438.

(2). See also *Jumabhai v. Khemji Lubdas*, I. L. R., 14 B. 1.

(3). 5 C. L. R., 496.

(4). *Keats v. Burton*, 14 Ves. 434.

(5). *Brown v. Higgs*, 8 Ves. 561-569.

(6). *Knight v. Knight*, 3 Beav. 148;

see also *Mussoorie Bank v. Raynor*, L. R. 9 I. A. p. 70; S. C. I. L. R., 4 A. 500 and *Kumarasami v. Subbaraya*, I. L. R., 9 M. 325 at p. 326.

(7). *Kumarasami v. Subbaraya*, I. L. R., 9 M. 325 *Supra*.

out of the income of his property ten persons should be fed daily and that one day's 'Ubhayam' should be performed during a certain festival in Arunachallesvara Swami Covil in Black Town that there was a valid charge created for such purposes; but where the testator directed in the same will that his executors should give according to their wishes to his brothers, their wives and children, it was held in the same case that there was no trust created by such words which were merely recommendatory and gave a discretion to the executors.

It is not possible within the limits of this work to go through the entire ground taken by the Courts English as regards precatory trusts. The reader is referred to the standard works upon trusts and especially to Lewin on Trusts¹.

Assuming that there was a dedication of property for religious purposes (or for idols) such dedication does not require the assent of the state to render it valid. Thus in *Juggut Mohini Dossee v. Mussumat Sokhaemoney Dossee*,² where the suit was to set aside an alienation of endowed property alleged by the plaintiff to have been made for purposes not binding on the endowment and to recover possession, the Privy Council observed "It was argued that such dedications of property without the assent of the state should be regarded as merely revocable appropriations, of which the founders might vary the use. No authority whatever was adduced in support of this position which strikes at the root of most modern endowments of the like nature."³

We shall on a future occasion refer to the various kinds of dedications where a perfect trust is admitted or proved.

NOTES OF INDIAN CASES.

Chabildas Lallubhoy v. Mawji Dayal, I. L. R. 26 B. 82. We very much doubt the propriety of the reasoning in this case though the actual decision may be correct. A mortgagee not entitled to possession under the mortgage sells under a power of sale vested in him and some other person becomes the purchaser. The mortgagee himself was not entitled to possession and the mort-

(1). pp.

(2). 14 M. I. A. 235.

(3). Their Lordships referred with Leading cases on Hindu Law Part II approval to the case collected in Nortons p. 106.

gagor could not, therefore, be said to be in possession "by the permission of" the mortgagee. The purchaser, therefore, under the sale held by the mortgagee in exercise of the power could not apply to eject the mortgagor under S. 41 of the Presidency Small Cause Courts Act. It was not necessary to consider whether a purchaser under such circumstances could be deemed to be a person claiming through the mortgagee. If the mortgagee was entitled to possession and the mortgagor was in possession with the permission of the mortgagee, we do not see why the purchaser under the sale held by the mortgagee in exercise of the power cannot apply under S. 41 as being a person claiming under the mortgagee. *Jenkins*, C.J., had to admit that the mortgagee was in a certain sense, a person through whom the purchaser claimed but he observed that this was not so under S. 41. Why S. 41 should admit of a different construction we fail to see.

Virupakshappa v. Shidappa, I. L. R., 26 B. 109.—We think the decision in this case is correct. We think the Bombay High Court is justified in extending the necessity for obtaining the sanction of the court to the case of a compromise in execution proceedings. It can no longer be doubted that execution proceedings are proceedings in a suit, though after decree, and that orders passed thereon are orders in the suit in which the decree is made which is in process of execution. *Shankur Sarup v. Mejo Mal*, I. R., 28 I. A., p. 203 at p. 209. Compromises made in such proceedings will, therefore, require the sanction of the court when one of the parties to the compromise is a minor.

Rango v. Bhomshetti, I. L. R., 26 B. 121.—We think the decision of the judges in this case on the construction of sections 92 and 93 of the Transfer of Property Act is correct. Indeed, there can be no doubt that under section 93 of the Transfer of Property Act an extension of time can be asked for but for the curious view held by the Madras High Court that in a redemption suit the plaintiff is not entitled to apply for extension after the time fixed in the decree, but that he could apply for such extension if the mortgagee asked for a further decree as contemplated in section 93 of the Transfer of Property Act. (*Vallabha Valiya Rajah v. Vedapuratti*, I. L. R., 19 M. 40). We, however, think that

section 93 is plain in its language and does not warrant the construction placed by the Madras High Court in the case above referred to, and it is, therefore, satisfactory to learn that this view is not accepted in the recent Full Bench case where the judges have considered at length the construction to be placed upon this and other similar sections of the Transfer of Property Act (*Mallikarjunadu Setti v. Lingamurti Pantulu, &c.*, I. L. R., 25 M. 244).

Sayad Gulamali v. Miyabha, I. L. R., 26 B. 128.—The decision in this case seems hardly satisfactory. We cannot understand the distinction that is drawn by the Bombay High Court between an acknowledgment which bears no date and an acknowledgment which is wrongly dated. The judges are wrong in holding that they must look within the four corners of section 19 to see whether such evidence (i. e., as to the right date) is admissible. Even if such a view be accepted there is no warrant for holding why if two dates are given in a document evidence is not admissible to prove the correct date. All that paragraph 2, section 19, of the Limitation Act does, is to exclude oral evidence of the contents of a document, and this is exactly the reproduction of section 91 of the Evidence Act. It has been held under section 91 of the Evidence Act that oral evidence is admissible to prove the receipt of consideration (See Explanation to the said section and *Sah Lal Chand v. Indarjit*, I. L. R., 22 A. 370). The test adopted by *Fulton, J.*, that if the genuineness of another document from which the date can be inferred be admitted, then such document can be looked at for the purpose of ascertaining the date in the acknowledgment but that it is inadmissible, if disputed, seems hardly satisfactory.

If a wrong date is inserted by mistake, why is oral evidence not admissible to show such mistake? Taking the Bombay decision to its logical extent, oral evidence is inadmissible for such a purpose. We think the more reasonable view is to regard the rule contained in section 19 as a rule of evidence, mentioned by the legislature by way of caution, and as supplementary to the rules contained in the Evidence Act (sections 92 to 99) and not as overriding those provisions.

Naranbhai v. Ranchod, I. L. R., 26 B. 141.—There can be no doubt that the decision in this case is correct though we cannot agree in all the reasoning adopted by the Bombay High Court.

No doubt the law allows a suit for partial partition to be brought by a coparcener in case a portion of the joint property is bought by a stranger. If the purchaser of a share of one co-parcener excludes another, it is reasonable to hold that the latter may bring a suit for joint possession with reference to the property from which he is excluded by such purchaser. But we cannot understand how a suit for partial partition or for joint possession merely can be maintained in a case where one member is altogether excluded by the other members. He must bring a suit for general partition.

Ningareddi v. Lakshmawa, I. L. R., 26 B. 163.—We cannot accept this decision as satisfactory. The Bombay High Court has held that during the father's life-time a concubine cannot claim maintenance, and that as the father made a gift of ancestral property to the concubine for such maintenance, the gift is invalid as against the son. But why is the son liable for her maintenance merely because the father's connection with her became permanent and the father continued in his immoral habits and became a sinner permanently? Why is the son bound to provide out of the ancestral property maintenance for such concubine? If the father had contracted a debt to pay the concubine and made an alienation of the ancestral property for such purpose, the son is not bound by the same under the rulings of the Privy Council in *Girdharee Lal v. Kanltoo Lal* and kindred cases. If that is not an immoral debt, we do not see what is an immoral debt within the meaning of the said Privy Council rulings. Nor do we see how the son is liable to pay maintenance out of the ancestral estate for his father's concubine (whatever her rights may be as regards the father's self-acquired property). Surely there is no pious duty imposed on the son to pay for his father's immorality, and he should not be punished for his father's persistent immorality by an obligation imposed on him to pay maintenance out of the ancestral estate to the concubine continuously kept by his father especially when the Court holds that the father himself is not liable.

We can well understand the father himself being made liable to pay maintenance for his continuously kept concubine upon the authority of the texts to be found in the Hindu treatises. In that view there may be reason to hold the son liable and bound by the father's alienation for such a purpose. But this view has been

thrown overboard by the Bombay High Court (*vide* also *Ramanarazu v. Buchamma*, I. L. R., 23 M. 282).

Nathu v. Keshawji, I. L. R., 26 B. 174.—The judgment of Mr. Justice *Chandavarkar*, in this case is well worth perusal though we are not able to agree in all that he says. It is tiresome to evolve some general principles of classification out of the tangled mass of discordant decisions on the question whether a suit is of a civil nature and triable by the ordinary civil courts and to assign to any decision its place in any particular class. One of the learned judges thinks that the law in Bombay as laid down in the Bombay Regulation II of 1827, S. 21, is different from the law in the other Presidencies, but apparently Mr. Justice *Chandavarkar* is of opinion that there is no such difference. One is also impressed at first sight with the fact that on such a question there ought to be no difference. The question whether a suit is of a civil nature triable by the ordinary civil courts, or is not of a civil nature so as to be outside the pale of the civil courts could not be answered in one way in one place and in another way in another place though the Privy Council in *Sri Sunkur Bharati Swami v. Sidha Lingayah Charanti*, 3 M. I. A., p. 198, observed without deciding the point that there might be a difference between the law of England and the law in Bombay. The question in that case was as to the right of Sri Sankarachari Swami to the exclusive right of *Adavi Palaki* and the Privy Council observed that in England the grantee of a dignity from the Crown could not maintain a suit against a person who might wrongfully assume the like dignity, but that it did not necessarily follow that the law of Bombay was the same. They remitted the case back with a direction that the courts in India should try that question. When the case came before the Sadr Court, the Sadr judges by a majority held that the suit was not maintainable (*Sri Sunkur Bharati-swami v. Sidha Lingayah Charanti*, I. L. R., 2 B. 373 note). However this may be, it stands to reason that the law in the different provinces of India should be the same.

Annapagauda v. Sangadijyapa, I. L. R., 26 B. 221.—The view now expressed by the Bombay High Court was advocated by us so long ago as 1899 (*vide* our remarks in 9 M. L. J. p. 168). The Calcutta High Court has always held (See *Azuddin*

Hossein v. Lloyd, 13 C. L. R. 112, *Wajibun v. Kadir Baksh*, I. L. R. 13 C. 292 and *Chhato Ram v. Billo Ali*, I. L. R., 26 C. 51) that a guardian, whether natural or certificated, has no power to acknowledge a debt under section 19. The Madras High Court has taken the view that a natural guardian is entitled to acknowledge a debt under section 19 so as to give a fresh starting point. (*Sobhanadri Appa Row v. Sriramulu*, I. L. R., 16 M. 221 and *Kailasa Padiachi v. Ponnukannu Achi*, I. L. R., 18 M. 456). The Bombay High Court in *Bhaskur Tatya Shet v. Vijalal Nathu*, I. L. R., 17 B. 512, held that the manager of a joint Hindu family was so entitled, but that a natural guardian was not so entitled (*Maharano Shri Ranmelsingji v. Vadobal Vakkutchand*, I. L. R., 20 B. 51). However, a Full Bench of the Bombay High Court has held in this case that a guardian appointed under the Guardian and Wards Act has authority to acknowledge a debt as being an agent within the meaning of section 19 and to pay part of the debt so as to give a fresh starting point under section 20, provided the act is done for the protection or benefit of the ward's property.

Joshi Bhaishankar v. Bai Parvati, I. L. R., 26 B. 246.—There can be no doubt as to the correctness of the decision in this case. It seems to us, however, that the language used by the Legislature has been particularly unhappy which is by no means an uncommon virtue of the Indian Legislature. S. 20 of the Limitation Act requires that payment of the principal of a debt made by the debtor or by his agent duly authorized in that behalf gives a fresh starting point provided the fact of the payment appears in the *handwriting of the person making the same*. The Bombay High Court has held in this case that a payment made by the debtor does not give a fresh period under section 20 where the fact of the payment appears not in his handwriting but in the handwriting of a person asked by the debtor to note the payment—the debtor himself being prevented or incapacitated from illness to do the act. If the rule is logically applied, it follows that a part-payment made by an agent authorized by the debtor but not in the handwriting of such agent but in that of the debtor himself will not satisfy the wording of section 20. Indeed, Mr. Justice *Chandavarkar* states that this will be so (see p. 251). But we are unable to see what the policy of the law is in declaring that the debtor's

handwriting should be excluded from consideration when he is the person most interested in the matter. However most of such cases would probably fall under section 19 of the Limitation Act as being acknowledgments of liability.

Varajlal v. Ramdat, I. L. R., 26 B. 259.—There can be no doubt as to the correctness of the decision in the case. But the case is a hard one. A father and son were assaulted at the same time by the defendants. They brought a joint suit against the defendants, and it was held that they were not entitled to do so. Section 26 of the Civil Procedure Code governing the matter is substantially the same as order XVI, rule 1 of the Rules of Supreme Court as it stood before the alteration in 1896 (See. [1896] W. N. (October 31), p. 291). The decision of the House of Lords in *Smurthwaite v. Hannay* (1894), A. C. 494, is authority for the position that the rule as it stood prior to the alteration in 1896, prohibited the joinder of plaintiffs who had no joint interest in the cause of action. This decision was followed by the Privy Council in a case from China in the *Peninsular and Oriental Steam Navigation Co., v. Tsune Kijima* [1895], A. C. 661, which was a suit for damages resulting from maritime collision caused by defendants' negligence. The rule laid down in *Smurthwaite's case* was followed in the English cases of *Carter v. Rigby and Co.* [1896], 2 Q. B. 113 and *Benett and Co. v. McIlwraith and Co.* [1896], 2 Q. B. 464. Since those decisions the rule has been altered in England. So altered the rule runs thus:—"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative where if such persons brought separate actions, any common question of law or fact would arise." The altered rule became the subject of consideration by the Court of Appeal in *Stroud v. Lawson* (1898), 2 Q. B. 44, and it was held in the English Courts that the joinder of plaintiffs where the right to relief prayed for should arise out of the same transaction and where a common question of law or fact should arise was not bad. So, the Universities of Oxford and Cambridge were permitted to join as plaintiffs in a matter in which they complained of the defendants' act in publishing books under certain titles, so as to induce the public to believe that they were the publica-

tions of the Universities. *Universities of Oxford and Cambridge v. George Gill and Sons* [1899], 1 Ch. 55. So also, an action of conspiracy was allowed to be maintained by several members of an association of master builders against the officials of various trade unions. *Walters v. Green* [1899], 2 Ch. 696. Even before the rule was altered, the practice of the Admiralty Courts was different, and it was held that the rule was not applicable to claims for rewards for salvage services, in which case all persons interested in a salvage service might be allowed to join, and even in case of collision the Admiralty practice was that all persons interested in the ship damaged might join in one suit for damages (See *The Marechal Suchet* [1896], p. 233). It is high time that the rule laid down in section 26 should be altered on the lines indicated in the English rule, and if the section is altered, courts would save much of their time and it would be highly convenient both in the interests of suitors and justice that the rule as to joinder of plaintiffs should be placed on a more satisfactory condition. It is, therefore, satisfactory to learn that the new Procedure Bill proposes to alter the law much on the same lines as has been done in England. The permission given to the two plaintiffs to elect as between themselves so that one of them may proceed on the plaint already filed, is but reasonable and is in accordance with the procedure followed in *Sandes v. Wildsmith*, [1893], 1 Q. B. 771.

Vittaldas v. Dattaram, I. L. R., 26 B. 298.—There can be no doubt as to the correctness of the decision in this case. Where there is no pending litigation, section 462 of the Code does not apply and no sanction is necessary. We may add that even if there be a pending litigation, the agreement, being one to refer disputes for arbitration does not come within the scope of section 462, C. P. C., and is not voidable for want of sanction: *vide* the recent ruling of the Privy Council in *Ghulam Khan v. Muhammad Hussan*, I. L. R., 29 C. 167.

Purushottam v. Kala Govindji, I. L. R., 26 B. 301.—We do not think the Bombay High Court is quite right in stating as a broad proposition that in the Mofussil a legatee is entitled to sue the executor for his legacy as such where the executors have not assented to the legacy. There is no reason why the salutary rule embodied in section 292 of the Indian Succession Act and section 112 of the Probate and Administration Act, which only have

adopted the principles of English common law in this respect should not be followed in such cases even in the mofussil as a rule of justice, equity and good conscience. If the executor does not consent to a legacy, the remedy of the legatee lies only in a suit for administration. This principle was adopted by the Madras High Court in *Rajamannar v. Subbulakshmi*, 2 M. L. J., p. 182.

The fact that the executors as such do not take any estate but only get such powers as are conferred on them by the will does not detract from the position that unless the executors assent to the legacy, the legatee's title is not complete. Of course, it may be, that where a suit is brought by the legatee for the recovery of the legacy under such circumstances, it may be regarded as, or may be converted into, a suit for administration (see *Rajamannar v. Subbulakshmi*, 2 M. L. J. 182 and cf *Okhoy Coomay Bonnerjee v. Koylash Chunder Ghosal*, I. L. R., 17 C. 387).

Tarvad Bholanath v. Bai Kashi, I. L. R., 26 B. 302.—There is a great diversity of opinion in the different courts and even between the different benches of the same court as to the procedure to be adopted in attaching a debt secured on the mortgage of immovable property. And though it is highly desirable that this should be set at rest, the new Procedure Bill does not attempt to touch this matter, excepting in cases where there is a personal covenant when provision is made that the debt under the mortgage may be realised by the garnishee procedure. In *Appasami v. Scott*, I. L. R., 9 M. 5, the Madras High Court held that a mortgage-debt was immovable property and must be attached as such under section 274, C. P. C. In that case *Turner*, C. J., though he admitted that if the execution-creditor desired to bring the security to sale, he must observe the procedure as to immovable property, yet doubted whether he could not effectually attach and bring the debt to sale in the manner in which other debts are attached and brought to sale (under section 268, C. P. C.). He however was forced to admit that the sale of a debt apart from the security was contrary to the policy of the law in this country (and we may add of all countries), which aims at securing the judgment-debtor from loss on the occasion of an auction sale. *Sami v. Krishnasawmi*, I. L. R.,

10 M. 169 the court held that a sale of a mortgage debt held in pursuance of an attachment under section 274 entitled the purchaser to bring a suit for recovery of the debt out of the mortgaged property, and that it was not necessary that the procedure laid down under section 268, C.P. C., should also be adopted to validate the sale. Whether the debt was so effectually transferred by such sale as to enable the purchaser to sue upon a personal covenant was not decided, as it was admitted that a suit to enforce the personal covenant was barred by limitation. But the question as to the right procedure to be adopted in attaching a mortgage debt is different from the question whether when a wrong procedure is adopted and is not questioned and set right by appeal or otherwise, the purchaser gets an absolute indefeasible title. This latter question is answered in the affirmative in *Muniappa Naik v. Subramania Ayyan*, I. L. R., 18 M. 437; see also *Achamma v. Basappa*, 8 M. L. J., 1. Of course the purchaser can get no higher interest than what appears from the sale certificate. It all depends upon the wording of the sale certificate. Where the sale certificate merely shows that the debt is sold and nothing is said about the security, the question may arise whether by sale of the debt, the security also passes to the purchaser. If it is the case of a transfer *inter vivos*, section 8 of the Transfer of Property Act makes express provision that such securities pass to the transferee with the transfer. Whether the same rule follows in the case of a court sale is another question. In *Baldev v. Ramchandra*, I. L. R. 19 B. 121, the Bombay High Court held that Sec. 274, C. P. C., will apply though that case falls under the same class of cases as I. L. R., 18 M. 437 and 8 M. L. J. 1. In Calcutta the case of *Srinath Dutta v. Gopalchundra Mittra*, I. L. R., 9 C. 511, is authority for the position that section 274 is the proper procedure. But in *Debendrakumar Mandel v. Rup Lall Dass*, I. L. R., 12 C. 546, the contrary view was held, though that case was one in which the principle of *Muniappa Naik v. Subramania Ayyan*, I. L. R., 18 M. 437 was applicable. The case of *Kasinath Das v. Sadasiva Patnaik*, I. L. R., 20 C. 805, steered midway between the two cases in I. L. R., 9 C. 511 and I. L. R., 12 C. 546, and explained the latter case in the proper way, as explained by the Madras High Court. The cases in Allahabad adopt the rule laid down by the Madras High Court in *Appasami v. Scott*; see *Buddoo Mull v. Maharoop*, 6 N. W. P. 129, and

Musamat Bhawanikuar v. Gulab Rao, I. L. R., 1 All. 348, though the case of *Karimunnisa v. Phulchand*, I. L. R., 15 A. 134, seems to lay down a contrary view as regards the debt of a usufructuary mortgagee out of possession, and distinguish the earlier cases on the ground that there was no provision in Act VIII of 1859 for attachment of decrees like section 273 of the present code. The principle laid down in I. L. R., 18 M. 437, may be gathered from the decision of the Privy Council in *Rai Balkrishna v. Mussumat Masuma Bibi*, 9 I. A. p. 182 at p. 196.

In the case in Bombay under consideration, the sale was sought to be set aside under section 311, C. P. C. The judges hold that attachment of a mortgage-debt is governed by section 268, C. P. C., as not being immoveable property within the meaning of section 274, C. P. C.

SUMMARY OF RECENT CASES.

Specific Relief Act, Sec. 9—Landlord's right of suit.

Sonaton Thome v. Sheik Helim, 6 C. W. N. 616.

Sec. 9 of the Specific Relief Act contemplates the case of a person who, being in physical possession of property, is dispossessed.

Where a tenant is dispossessed, the landlord has no right of suit under Sec. 9 though the tenant may, after such dispossession, collude with the trespasser and refuse to bring a suit against the trespasser.

Legal Practitioner's Act, XVIII of 1879, as amended by Act XI of 1896, S. 13, cl. (f)—Pleader's antecedents prior to enrolment.

In the matter of Syed Wajid Hossain, 6 C. W. N. 556.

Where a person convicted of the offence of personating a public officer applied for the muktearship examination concealing his conviction and on passing the examination was enrolled he might be suspended under Sec. 13, cl. (f) for such concealment though he might have been guilty of it before enrolment. The

words, 'any other reasonable cause' in cl. (f), Sec. 13. are not to be read *ejusdem generis* but are to be taken in the wider sense as embracing disqualifying causes of a kind different from strictly professional.

Equity of redemption—Adverse possession.

Lalla Kanhoo Lal v. Musamat Manki Bibi, 6 C. W. N. 601.

An equity of redemption may in the case of an usufructuary mortgage be extinguished by adverse possession on the part of a stranger, while the mortgagee continues in possession and the period of redemption is still running.

Continued possession by the mortgagee is not *per se* sufficient to keep alive the mortgagor's title, but the title to redeem and to the ownership of the mortgaged property is notwithstanding such possession, capable of being extinguished by adverse possession for the required period.

Possession in Sec. 28 of the Limitation Act embraces both actual possession and possession-in-law.

Where, therefore, the mortgagee in possession gave over the surplus profits to some person who claimed to be the sole representative of the mortgagor and recognised his title and the person so recognised exercised other acts of ownership.

Held, that a person alleging to be the daughter of the mortgagor and suing for redemption after 17 years from the death of the mortgagor but within 30 years from the date of the mortgage was barred by adverse possession from claiming such right.

Hindu Law, Bengal School—Maintenance of widowed daughter-in-law—Nature of obligation upon heirs of father-in-law.

Siddessuree Dassee v. Janardan Sircar, 6 C. W. N. 580.

A moral obligation exists on the part of a father-in-law to maintain his dependent daughter-in-law, and such moral obligation ripens into a legal one as against the heir who has inherited his ancestral property.

A Hindu widow does not lose her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity or for any other improper purpose.

The right of a widow to maintenance is one accruing from time to time according to her wants and exigencies.

The above principles are applicable equally to the Bengal and Mitakshara Schools.

A daughter-in-law continues to be a dependent member of the father-in-law's family notwithstanding she may have gone to live with her father.

o appeal to 1st Court—Remedy—Revision.

Ganga Charan Roy v. Sasti Mandal, 6 C. W. N. 614.

When no appeal lay to the Subordinate Judge in law, no second appeal lay to the High Court from his decision, though he had in fact assumed jurisdiction by way of appeal.

Where therefore a decree was passed by the District Munsif in plaintiff's favor in accordance with an award and the Sub-Judge on appeal reversed this decree on the ground of the arbitrator's alleged misconduct.

Held, that the plaintiff's remedy was not by way of second appeal to the High Court, but by an application under S. 622, C. P. C.

Foreign Corporation—Carrying on business within jurisdiction.

Dunlop Pneumatic Tyre Company, Ltd., v. Actien-Gesellschaft

Fur-Motor und Motorfahrzeugbau Vorm Cudell and Co.

[1902], 1 K. B. 342.

The hiring of a 'stand' within the jurisdiction by a Foreign company for the purpose of exhibiting articles of manufacture of such Company at a show lasting for some (9) days is a carrying on of business so as to make the Company resident within

jurisdiction, and such Company could be served with a writ in an action by the plaintiffs for infringement of their patent through the person sent by the Company for doing the business of exhibition. Such person is a "head officer" within the meaning of Order IX r. 8.

[In India outside the Presidency towns the matter will be governed by Ss. 17 and 436 of the Civil Procedure Code. The wording of these sections is more limited. See *Murugesu Chetti v. Annamalai Chetti*, I. L. R., 23 M. 458.]

Promissory note—Inchoate stamped instrument—Negotiation—Rights of payee.

Hardman v. Wheeler [1902], 1 K. B. 361.

Negotiable Instruments acquire their special validity in the hands of a holder in due course, not on their coming into being but on their passing from hand to hand. So long as a negotiable instrument remains in the hands of the payee it is not negotiated. The payee of a pro-note can not therefore recover irrespective of any question of authority of the person who delivers the pro-note to such payee. If the delivery of the pro-note has not been under the authority of the maker, the payee will not be entitled to recover though he may not have been aware of any want of authority and may have himself parted with his money on the faith of the pro-note and though he may be a holder in due course.

• The proviso to S. 20 of the Bills of Exchange Act, 1882, applies only when the pro-note or other negotiable instrument is negotiated, and it cannot be said to have been negotiated when it is in the hands of the payee or other party to the instrument. Mere delivery to a person by another of an instrument filled up by the latter in excess of the authority given by the principal is not a 'negotiation' within the meaning of the proviso.

Where, therefore, a stamped inchoate instrument signed by A was given to B with instructions to fill it as a pronote in B's favor for £15, but B filled it up as a pronote in favour of C for £30 (the highest amount covered by the stamp) and delivered it to C and received £25 and misappropriated the whole himself. *Held*,

that C was not entitled to recover from B and was not entitled to the benefit of the proviso to S. 20.

[In India the matter has to be looked at from a different point of view. Here the matter is governed by S. 20 of Act XXVI of 1881 (Negotiable Instruments Act). The words 'negotiated to a holder in due course' found in the corresponding section of the English statute do not occur in S. 20 of the Indian Act. This latter section enacts that the person signing an inchoate stamped instrument "shall be liable to any holder in due course." S. 9 expressly says that "a 'payee' may be a 'holder in due course.'" S. 46 is consistent with this view and S. 120 has probably no bearing on this question, or if it has any bearing, is only in favor of the payee's rights. The decision under the Indian Law will apparently be otherwise.]

Power to appoint settled estate—Exercise of power—Interest of appointee—Principles of Interpretation—Taxing statutes.

Attorney-General v. Selborne (Earl of) [1902], 1 K. B. 388.

The effect of the exercise or execution of the power is to determine the estates limited under the original settlement in default of appointment, and the estates limited under the power take effect from the time of the execution of the power in the same manner as if they were contained in the deed or settlement creating the power. The appointee takes a new estate (created by the execution of the power) and not any estate in acceleration of the old.

In a taxing statute (such as the Succession Duty Act, 1853) the words must be construed according to their natural meaning. An equitable construction is not admissible in a taxing statute. Effect ought to be given to the words of the statute, so that if the subject is within the letter of the law, he must be taxed however great the hardship may appear. But if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may, otherwise, appear to be. A benevolent construction in favor of the Crown is not permissible.

Where, therefore, under a settlement made by a father at the time of the son's marriage, an estate was conveyed by the father to

trustees for such uses as the father and son should jointly appoint, and, in default of or until such appointment, to the use of the father for life and after his death to the son in fee simple and the father and son jointly exercised the power by appointing the estate to the son in fee and the father died subsequently.

Held, that the son took the estate by a new title and not by succession the title to which was accelerated and no succession duty was payable.

Conviction final or unreversed—Witness negligently giving false evidence—Action against witness.

Bynoc v. Bank of England [1902], 1 K. B. 467.

In order to sustain an action for maliciously and without reasonable and probable cause setting the criminal law in motion, it is essential to show that the criminal proceeding alleged to be instituted maliciously and without reasonable and probable cause, terminated in favor of the plaintiff.

A convicted person, therefore, so long as his conviction remains unreversed, cannot maintain an action against a witness for negligently giving false evidence, which has caused him to be wrongfully so convicted.

Contract—Breach before time fixed for performance—Measure of damages.

Michael v. Hart and Co. [1902], 1 K. B. 482.

In cases where one party to the contract refuses to perform his part of the contract before the time fixed for performance arrives, the contract is not of itself rescinded, but it is at the option of the other party to treat such repudiation as a definitive breach of the contract, and thereupon to treat the contract as rescinded, or he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation until the time fixed for performance arrives. If on such date there is still a breach by non-performance, the measure of damages will be calculated with reference to the market price of the goods at the time of such later date.

Insurance against accidents—Proposal form filled up by agent of insurers and signed by assured without reading—Fraud of agent—Authority of agent.

Biggar v. Rock-Life Assurance Company, [1902], 1 K. B. 516.

An insurance company will be entitled to avoid a policy when the answers and statements made in the proposal form (upon the basis of which the policy is made) are false or incorrect, though the agent of the company may have filled up the form and the assured signs and sends such form to the company without reading.

A person who chooses to sign, without reading it, a proposal form which somebody else filled in, and acquiesces in such form being sent in as signed by him without taking the trouble to read the same must be treated as having adopted it and cannot plead that the insurance company is estopped from avoiding the policy for false statements in the proposal form on the ground that the insurance company, is, through its agent, really responsible for the statements being false.

The authority of the agent to bind the principal by his act will not extend to an act done by him in fraud of the company and for the benefit of the assured especially where it is in the latter's power to defeat the fraudulent intent.

An agent of an insurance company who canvasses business for such company may be an agent for putting the answers in the proposal in form, but is not an agent of the company to invent answers to the questions framed in the proposal. Such an agent so inventing the answers is really acting for himself or the assured and against his principal and no agency exists between himself and the company in respect of such transaction. *New York Life Insurance Company v. Fletcher*, 117 U.S. 519 approved.

Quare:—Whether the assured will be entitled to recover back the premium paid on the ground that the policy is void on the ground of fraud or mistake?

Garnishee summons—Attachment of debt—Payment by garnishee of amount in garnishee order into court—Assignment by judgment-debtor of balance in hands of garnishee, perfected by notice—2nd garnishee summons and attachment of balance—Payment by garnishee into court without pleading assignment.

Yates v. Terry, [1902], 1 K. B. 527.

Garnishee proceedings are for the purpose of enabling a judgment-creditor to realize his judgment.

The balance of what may remain after satisfying such judgment is capable of assignment and if the assignee completes his title by notice to the garnishee, the assignment is effective and the garnishee holds the balance so assigned for the assignee.

Where, therefore, the garnishee paid into court the amount of the judgment-debt out of the debt due by him and after receipt of notice of the assignment to the plaintiff of the balance received a fresh garnishee summons as regards the same and paid the amount due under the second garnishee order without bringing to the notice of the court the fact of assignment (and apparently of his own motion and without any order of court to pay).

Held, that he was liable to pay or make good the balance so assigned to the assignee.

[In India section 268 (para 3) of the Civil Procedure Code will apparently protect the garnishee in the English case, though there is no garnishee procedure obtaining in the code. The debt may be attached by a prohibitory order and a debtor so prohibited may pay the amount of his debt into court though he may not be compelled to do the same and such payment will discharge the debtor as effectually as payment to the party entitled to receive the same].

Criminal Law—Indictment—Proviso and Exception.

Rex v. James, [1902], 1 K. B. 540.

It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause.

If negatives are descriptive of the offence, they must be set forth in the indictment.

Sections 12 and 16 of the Married Woman's Property Act, 1882, made it a criminal offence (larceny) for the wife to take (steal) the goods of her husband when about to leave or desert him, and on the trial of such charge it would not be necessary that the indictment should contain averments that the accused was the wife of the prosecutor and that she took the goods when leaving or deserting or about to leave or desert her husband.

If the conditions imposed by a proviso do not affect the quality or character of the offence, then they merely introduce matters which may be pleaded by way of defence and they are not matters necessary to be negatived in the indictment.

Retainer of solicitors—Resolution not under seal—Subsequent confirmation under seal—Costs of solicitors for work done on faith of retainer—Right of corporation to resist attack on existence.

Brooks, Jenkins and Co. v. Torquay Corporation, [1902], 1K. B. 601.

A promise under seal, whether made for a past consideration or without consideration is binding. It would not be *ultra vires* for a local authority or corporation to pay for work of which they had the benefit though such work was done under a contract which was invalid as not having been entered into under seal. Much less is it *ultra vires* for a local authority or corporation to bind themselves to pay for such work by a subsequent instrument under seal.

A promise made by an instrument under seal and without consideration is held to be binding because the deliberation of the act of the parties is ensured in the execution of such instruments. On a similar principle the object of section 174 of the Public Health Act 1875 (38 and 39 Vict. C. 55) in enacting that the terms of important contracts (*i. e.* contracts for an amount exceeding 50£) should be expressed in writing is that the local authorities should not bind themselves to such contract without that degree of deliberation which is supposed to be insured by the formalities required in the execution of a deed but does not render, contracts not in writing, void when in fact performed.

Solicitors therefore who acted upon a retainer made in pursuance of a resolution not under seal but afterwards confirmed by a resolution under seal were held not disentitled to recover their costs merely because the retainer was not accepted by them in writing.

Quære:—Whether a district council in opposing a bill by which their district was to be dissolved could be said to exercise a right or power which they possessed independently of the Act constituting them as a corporation *viz.*, the right of self-preservation necessarily vested in every such body or a right to resist an attack on their existence.

Actions on Tort and on Contract.

Sachs v. Henderson, [1902], 1 K. B. 612.

The distinction between an action on tort and one on contract is not a logical one.

If the claim of the plaintiff had been set out at large pointing to some particular stipulation in the contract as having been broken, the action would be one founded on contract. But where it is only necessary to refer to the contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one founded on tort. In nearly all cases of breach of duty there must be some antecedent consensual relation between the parties.

Leaving a dangerous substance—Negligence in not taking proper precautions—Liability for acts caused by trespassers.

McDowall v. Great Western Railway,

[1902], 1. K. B. 618.

Where one is guilty of negligence in leaving anything dangerous in a place where he knew it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third and the injury is so brought about, the person so guilty of negligence will be liable to the sufferer.

Where, therefore, a Railway Company shunted some vehicles on to a siding which was on an incline running down to a level crossing over a highway and did not leave them beyond the catch-point in the siding which would have absolutely prevented the vehicles if set loose from running down to the line and left them

behind the catch-point for the convenience of their shunting operations but secured them in such a position as to be safe if not interfered with by others.

Held, that the company was liable for injury done to the plaintiff by reason of the vehicles running down the incline and smashing the gate of the level crossing in consequence of some boys playing with the vehicles and unfastening the screw-coupling of the van and the partial release of the brake when the company were fully aware that the boys were in the habit of trespassing upon railway lines and amusing themselves by playing with the vehicles.

The defendant would be liable for injury caused if the placing of a dangerous thing, though not a cause of danger ordinarily, might yet become a cause of danger by reason of unlawful interference by others so as to create danger and the defendant knowing the risk of interference which would create danger omitted to take reasonable precautions to prevent its consequences.

English judgment, suit upon, in foreign Court—Judgment in foreign Court for less sum—Sequestration proceedings and satisfaction—Fresh suit upon English judgment for balance—Release in foreign country, effect of—Limitation—Acknowledgment of liability.

Taylor v. Hollard, [1902], 1 K. B. 676.

Where a plaintiff recovering judgment against the defendant in an English Court sued upon such judgment in a foreign court (Court of the South African Republic of Transvaal) and obtained judgment for a lesser sum in such court and in execution of such judgment obtained satisfaction therefor, he could not afterwards bring an action in England for the balance of the original English judgment as the foreign judgment was given for the plaintiff's whole cause of action and he had elected to take such foreign judgment in discharge of his whole cause of action by obtaining satisfaction in the Transvaal Court. But if he had not taken any steps in the Transvaal Court to realize such judgment then the plaintiff will be entitled to bring an action in England on the original judgment.

The principle of law and common sense is that a person cannot blow hot and cold at the same time or approbate and reprobate the same transaction.

Barber v. Lamb, 29 L. J. (C. P.) 234: S. C. 8 C. B. (N.S.) 95 followed.

The period of limitation for bringing such an action on the original judgment is 12 years under the Real Property Limitation Act, 1874 (37 and 38 Vict. C. 57) S. 8 and not 20 years under 3 and 4 Will 4 C. 42 S. 3.

In order that part-payment may operate to save the bar of limitation fixed by statute the payment must be made under such circumstances from which an admission of liability and a promise to pay can be inferred. This is so under 37 and 38 Vict. Ch. 57 S. 8 and 3 and 4 Will 4 C. 27 S. 40.

Harlock v. Ashberry, 19 Ch. D. 539 referred to.

Where, therefore, the plaintiff upon obtaining a judgment in the foreign court took proceedings for sequestration for recovery of the judgment-debt in such foreign Court and in such proceedings curators were appointed who satisfied the judgment-debt:—Held that this payment was not on account of the original English judgment, that the curator was not the defendant's agent to pay the money, and that the proceedings being *in invitum* no promise to pay could be legally inferred though the defendant took advantage of such payment and obtained his release and spoke of it as made by him.

A release in a foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country.

Gibbs v. Societe Industrielle; 25 Q. B. D. 399 referred to.

Innkeeper's liability—House full—Traveller's demand to pass night in the public sitting-room, when bed-rooms are full.

Browne v. Brandt, [1902], 1 K. B. 696.

The question whether a house is 'full' must be decided with reference to the habits of the people and the ordinary way of living

obtaining at the present time. The old cases could not therefore help in the solution of the question as what were called 'full' then would now be 'indecent over crowding'.

The true view of an innkeeper's position is he may not pick and choose his guests but must give the accommodation he has to persons who come to the inn as travellers for rest and refreshment.

Where the innkeeper acts reasonably and neither captiously nor unreasonably refuses to receive persons when he has proper accommodation for them he is not liable.

An inn may be said to be full for the purpose of affording accommodation for the night if all the bedrooms are occupied.

A person who comes to the inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full and the innkeeper is not under an obligation to receive him.

Chose in action—Insurance policy—Mortgage—Bankruptcy of mortgagor—Notice—Right of trustee in bankruptcy.

In re Wallis Ex Parte Jenks, [1902], 1 K. B. 719.

The general rule is, that as between several assignees or incumbrancers of a chose in action, the assignee or incumbrancer who has first given notice obtains priority.

A trustee in bankruptcy not being an incumbrancer for value and being only a statutory assignee of the bankrupt's property (including choses in action) subject to all equities existing therein at the commencement of the bankruptcy could not claim priority by giving notice over a good equitable mortgagee thereof for value who did not give any notice to the debtor.

Marine Insurance—General average—Person both owner of ship and cargo—Insurance of cargo—Liability of under writers.

Montgomery and Co. vs. Indemnity Mutual Insurance

Company, [1902], 1 K. B. 734.

The phrase 'general average' as found in policies of insurance, is used in contradistinction to 'particular average.' It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action

or design. It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage; and not in particular to the consideration, who are to contribute towards the indemnity. Contribution is a consequence not the characteristic which denotes the nature of the loss. The cause of loss is the true test to see whether there is a general average claim.

The occasion which will necessitate and justify the sacrifice by the master of either a portion of the cargo or a portion of the ship, is not merely the existence of danger to the ship, freight, or cargo but also fear of death. A sacrifice made by the master to avert perils of the sea is a general average act quite independently of the units or diversity of ownership.

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss to which the underwriters of a policy of insurance on cargo are bound to contribute though the assured may be both owner of ship and cargo.

Decision of Mathew J. [1901], 1 K. B. 147 affirmed.

The Brigella (1893), P. 189 dissented from.

Greeley v. Tremont Insurance Co. 9 Cushing 419 and

Potter v. Ocean Assurance Co. 3 Sumner 27 approved.

Master and servant—Authority of coachmen to pledge credit of master for forage supplied.

Wright v. Glyn, [1902], 1 K. B. 745.

In order to fix the principal for an order given by a person purporting to be his agent, either actual or ostensible authority to contract by the agent for the principal or ratification by the latter must be proved.

The mere relation of master and coachman does not clothe the latter with ostensible authority to pledge the master's credit for forage for his horses.

JOTTINGS AND CUTTINGS.

Oral Evidence.—There is a growing tendency noticeable in judgments of subordinate courts to set aside the entire oral evidence with the summary remark that the oral evidence on each side is interested and untrustworthy. It is true that the evidence is often interested and it may be that it is often untrustworthy. But a sweeping condemnation of the oral evidence altogether is the outcome of the laziness of the intellect and a want of judicial discrimination. Judges are appointed to sift the evidence, and the trained advocate is engaged to assist in the task of discriminating between truth and falsehood. There is no royal road to truth and no set methods of rejecting evidence *en masse* can help in the discovery of truth. The mind has to be applied to discover the difference between statement and statement and witness and witness, and to weigh the surrounding circumstances and the probabilities of the case, so that the court may be helped to the conclusion as to who are the witnesses of truth. And appellate courts too often encourage subordinate courts in this lazy and unconscientious habit of setting aside oral evidence altogether. The task is no doubt troublesome where it has to be performed at the risk of truth being lost altogether.

We would draw attention to the observations of Bhashyam Aiyangar, J., frequently falling from the Bench in the course of the hearing of appeals condemning this wholesale rejection of oral evidence altogether.

Mortgage decrees.—The law of mortgages is one of the most intricate branches of law, and the difficulties of suitors are multiplied by the want of attention on the part of the courts to the proper drawing up of decrees in mortgage suits. We shall, on this occasion, refer to one of the points to which the attention of the courts should be directed in settling mortgage decrees. In a suit for sale or redemption or foreclosure, the Transfer of Property Act provides that the decree should order that upon the mortgagor paying to the mortgagee or into Court the amount due on a day within 6 months from the ascertainment of the amount, the mortgagee should deliver up to the mortgagor all documents in his possession or power relating to the mortgaged property. Form No. 128 in the Civil Procedure Code which relates to a decree for sale follows this language and goes on to

provide that, upon the mortgagee making a re-conveyance and delivering up the documents, the Registrar should pay out to the mortgagee the sum paid into Court for principal, interest and costs. The difficulty which has been experienced in working such decrees and has been brought to the notice of the High Court in recent cases arises from the omission of the Court to ascertain what documents are in the possession or power of the mortgagee and to provide what should be done on failure by the mortgagee to produce the documents. After the mortgagor pays the money into Court, disputes very often arise as to the documents which are directed to be delivered up. The mortgagee may be unable to produce the documents, because they have been lost either on account of his negligence or without any fault on his part. Or the mortgagor may assert that the documents produced by the mortgagee are not genuine or are not the documents which he delivered to the mortgagee or that all the documents that he delivered have not been produced. In all these cases an inquiry has to be made as to what documents were delivered by the mortgagor to the mortgagee, and if all or any of them have not been produced by the mortgagee whether he is to blame for their non-production and what indemnity or compensation should be ordered to be given by the mortgagee to the mortgagor. It seems to us that these questions do not appropriately fall within section 244, Civil Procedure Code, which empowers the Court to decide all questions relating to the execution of the decree. The decree itself would be incomplete in the absence of a provision in respect of these matters, and they should properly be dealt with by the Court in passing the decree. Under the English law though a decree for sale or redemption is drawn up in very much the same form as that laid down in the Transfer of Property Act, liberty is invariably given to the parties to apply to the Court for further directions. The suit is regarded as still pending, and it would be open to the parties to apply for further inquiry or directions whenever necessary. Such liberty to apply for further directions is not provided* for by the Civil Procedure Code in respect of the courts in the Mofussil, and it is therefore necessary that these courts should settle these matters before the decree is finally drawn up.

*But see *Robert Fisher v. The Secretary of State for India in Council*, I. L. R. 22 M. 270 (288).

If the decree does not contain the necessary directions with reference to these points, it would not be open to the executing court to go beyond the decree. We shall illustrate our remarks by referring to some recent cases. In *Subbaraya v. Padmanabha*, 12 M. L. J. R., 63, the mortgagee in a suit for redemption stated that he had lost the title-deeds and could not produce them. The lower court directed the mortgagee to furnish security before drawing the money from the Court. This order was reversed by the High Court on the ground that there was no direction in the decree to furnish security to the value of the property. Here the mortgagor had to suffer by reason of the defect in the decree. In another case which came from Malabar, C. M. S. A. 6 of 1901, the mortgagee being unable to produce the documents, the District Munsif who had very strange notions of justice held that the mortgagee should forfeit all right to the mortgage money and that the mortgage money paid into court should be refunded to the mortgagor and that the mortgagor should have both the land and the money. It is a mistake to suppose that if the title-deeds are lost the measure of compensation is necessarily the value of the whole property or the whole of the mortgage money. The proper order to pass is to direct the execution at the expense of the mortgagee of an indemnity bond against all loss, costs, damages and other consequences which the mortgagor may sustain by the loss of the title-deeds, and where the documents have been lost through the negligence of the mortgagee, the expense of procuring fresh title-deeds or copies etc., may be allowed by way of compensation, and if any damage has been actually done to the estate by the destruction of deeds, such amount may also be allowed. The Court will not decree compensation for the speculative damages for any loss which the estate may sustain in future by the absence of deeds. The proper course, therefore, for the Court to adopt is to settle all these questions if there is any dispute and insert the necessary directions in the decree itself.

The Teaching of Law (an extract from an article by W. J. Brown in the *Law Quarterly Review*).—To find fault with one possible relation between lecturer and student is more easy than to define the true relation. That a lecturer should aim at leading his pupil on to right methods of reading, thinking, and study, is of

course indisputable. Not less so, that the pupil should be made to experience the feeling of joint interest in search after truth, rather than be treated as a receptacle into which ready-made truths may be poured. But beyond such general statement, it is difficult to go. Candour compels the confession that for the achievement of such purposes as I have suggested there is no absolutely best method, nothing more than a relatively best, which must be determined by reference to the special needs of the student, the personality of the lecturer, the nature of the subject, and the material which is available in the form of library and class rooms. Yet you may not be indisposed to grant me a plenary indulgence if, without presuming to dictate to others, I venture to occupy your time a moment in explaining the method which I have found most generally useful under circumstances which perhaps may be deemed typical. The method implies a division of the lecturer's work about equally between lectures proper and classes. The time in classes is devoted to oral discussion either of selected cases, or of the ground covered by the students in their answers to an examination paper which has been previously set to them. Obviously, the work of the lecturer on such occasions must be mainly catechetical. He guides discussion, endeavours to promote a general freedom of expression, and confines didactic statement to the briefest possible summary of the results of class discussion. In lectures proper, on the other hand, many considerable differences of method are inevitable. My own ideal has been to aim at securing about one-third of the lecture hour for the delivery of very brief notes in which the subject of study is re-cast in manual form, another third for free explanation and illustration, and the remainder of the hour for free class examination on the subject of references which have been specially prescribed in the previous lecture with the object of illustrating and enforcing the principles under immediate explanation. If such a procedure be well followed—and I know enough of its difficulties to appreciate how much that means—the lecturer is enabled to exercise a continuous directing influence over the student's reading. The student, accustomed to have his private reading submitted to the oral of examination in class, learns how to get out of a book what is in it. He enjoys, moreover, an opportunity of exercising himself in the art of replying to objections before an audience.

I hope you will not consider what I have said on the relation of lecturer and student to be inappropriate. Lest, however, you should think it concerns lecturers rather than students, I will venture to remark that the possibilities of high-class work in the lecture room are very largely dependant upon the students' understanding and sympathetic appreciation of the teacher's aims and methods. Probably few students recognize to how great an extent they determine by their approval or censure the character of the lectures which they attend. Just as a modern censor is apt to complain of the pulpit where he ought to blame the pew, so the critic of the law teacher may overlook the extent to which a teacher's methods must be affected by the demands of the student. If the student wants a *vade mecum* for examination purposes, if he sees no further than the attainment of some academic title or distinction, the lecturer can achieve little. The responsibilities of the student in the matter of successful class work and perhaps even of successful lectures, are fully as great as those of his lecturer. He must know how and when to speak; he must sometimes be patient with his fellow-students and sometimes, mayhap, with his lecturer; he must work out of lecture hours as well as within them; he must be active, and to some degree original, and must know how to draw intellectual nutriment from the active processes of criticism as well as the passive processes of listening. He must care sufficiently for truth to give of his time and energy in the pursuit of her.—*The Law Quarterly Review* (210).

* * *

What constitutes a clog on the equity of redemption.—The principle that an extortionate or oppressive contract is not necessarily enforceable because voluntarily made has been thought especially applicable to money lending transactions. Accordingly, if the borrower gives security, there is a rule that he may repudiate any part of his mortgage agreement that clogs the equity of redemption. Definitions of such an agreement, differing substantially, appear successively in English cases. The original test whether the mortgagor promises something beside repayment of the loan with interest, was succeeded by one less sweeping, namely, whether the mortgagor's by-agreement makes redemption harder. *Biggs v. Hoddinott* (1898), 2 Ch. 307. Then it was reasoned that

if the mortgage given was a security as well for the performance of any additional agreement as for repayment of the loan, redemption was made no harder because that very agreement became part of the mortgage obligation. *Santhy v. Wilde* (1899), 2 Ch. 474; See. 13, Harv. L. Rev. 595. It was problematical whether this decision left any case to which the rule against clogging redemption could apply; for by the admitted test there was no clog unless the burden of redeeming was increased, and by the decision itself agreements which most directly increased that burden were valid as becoming part of the mortgage transaction. Recently the question was neatly raised. A lessee of a public house mortgaged his term and purported to bind the land by a covenant to sell there none but the mortgagee's liquors. The incumbrance of the covenant was to exist during the whole term, even after the mortgage was satisfied. This particular stipulation the Court of Appeal held unenforceable, as being without the rule of *Santhy v. Wilde, supra*, because not secured by the mortgage. *Rice v. Noakes and Co.* (1900), 2 Ch. 445. The paradox is that if the mortgage had secured the covenant, the bargain, though harder than that in the principal case, would have been sustained. The House of Lords, in affirming the decision, chose rather to disapprove *Santhy v. Wilde, Noakes & Co., Limited v. Rice* (1902), A. C. 24.

The decision has more than the mere effect of weakening the rule in *Santhy v. Wilde*. The covenant made redemption no harder, if by redemption is meant obtaining a re-conveyance of the term. The judgment, however, interprets redemption in this connection as meaning a re-acquisition by the mortgagor of the property in the condition in which he transferred it. The covenant is accordingly held invalid so far as it caused an incumbrance on the land outlasting the mortgage. The technical nature of this result appears in the technical distinctions which it necessitates. A covenant binding land not covered by the mortgage would be no less erroneous than the one under discussion. Presumably, however, such a covenant would be enforced; for the present rule affects only agreements restricting the mortgagor's rights in the property he mortgaged. In fact, in a decision rendered pending, the appeal to the House of Lords in the principal case, the rule was held to be limited to agreements enforceable specifically in equity against property. *Carritt v. Bradley* (1901), 2 K. B. 550 (C. A.). The mortgage was

of a stockholder's controlling interest in a company. The Court sustained the mortgagor's collateral agreement to use this interest always thereafter to secure employment for the mortgagee by the company. There seems to be no true distinction from *Noakes v. Rice, supra*, for whether the remedy for breach is equitable or merely legal, does not concern a mortgagor who keeps his promise. In one case as much as in the other his use of the property is hampered. A recent Irish case approved in the judgment of the House of Lords in *Noakes v. Rice, supra*, does not recognize any such distinction. *Browne v. Ryan* (1901), 2. I. R. 633.

• Whether American courts will have to solve the complexities suggested by these cases and how they may do it is conjectural, for the whole doctrine seems yet undeveloped here. Cf. *Uhlfelder v. Carter's Admr.*, 64 Ala. 527; *Northwestern, etc., Ins. Co. v. Butler*, 57 Neb. 198.—*Harvard Law Review*.

We beg to acknowledge receipt of the following publications:—

Calcutta Weekly Notes	for	...	...	May.
Columbia Law Review	"	...	...	do.
Green Bag	"	...	...	do
Kayastha Samashar	"	...	...	do.
Canadian Law Times	"	...	...	do.
The Law Magazine and Review,,	"	...	...	do.
Virginia Law Register	"	...	...	do.
Law Magazine and Review	"	...	...	do
Case and Comment	"	...	...	do.
Indian Review	"	...	...	do.
The Bombay Law Reporter	"	...	...	do.
The Law Students' Helper	"	...	...	do.
The Lawyer	"	...	...	do.
Punjab Law Reporter	"	...	...	do
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PART VII.]

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TOPICS OF MALABAR LAW.

The Joint Family among The Nambudris.

The Nambudris are what may be called the indigenous Brahmins of Malabar. They settled in the country several centuries ago and became the sons of the soil. They acknowledge the authority of the Dharma Sastras in addition to the Vedas by which (they, as Brahmins, are undoubtedly bound, and there is no doubt that the principles of law laid down in the Dharma Sastras governed them when they migrated to Malabar. But they have perhaps changed more after their migration than the Aryans did in most other parts of India, so much so indeed that Brahmins in other parts of the country do not recognise their kinship with the Nambudris without considerable argument. They have become a part of the peculiar social system of Malabar, and are more intimately connected with the Sudra caste, than are the Brahmins in any other part of India. Amongst them, as amongst the Sudras of Malabar, the family property is indivisible, except with the consent of all the members thereof to whom the property belongs. Usually, only the eldest of a number of brothers marries, and amongst the sons of the eldest brother again, only the eldest marries, and so on amongst his sons. The other members consort with women of the Sudra caste; their children born of such women have no rights of property against them or against the property of their family, nor indeed any legal rights whatever such as children have against their father elsewhere. In strict law the Sudra consorts of Nambudris are not their wives, and their connection is not recognised as a legal marriage. See *Koraga v. The Queen*¹

There are very material points of difference between the religious and social observances of the Nambudris and of the Brahmins of the other parts of India. Most prominent amongst them is the absence of compulsory infant marriage. As a rule women are married only after puberty; and even after puberty many remain unmarried for a long time and some for life, owing to the difficulty of procuring husbands consequent upon only the eldest member marrying among males. The result is that many women continue to be attached to the family of their birth till death. We do not propose at present to deal with the other differences between them and other Brahmins as they have no direct bearing upon the subject under discussion. We must point out that a great deal of misapprehension exists concerning them and their customs, and owing to the absence of any systematic investigation into their law, there is often the greatest difficulty in deciding questions of inheritance and of rights of property when they arise. It is of the greatest importance to distinguish between their social observances, of which they have many that are very peculiar, and legal customs which affect their civil rights and which are binding upon them in courts of law. A very serious blunder was committed by the courts in Malabar in consequence of the failure to keep this distinction in view. A Sub-Judge, a native of the district and a Nair, held (O. S. 35 of 73, Sub-Court, Calicut) that the marriage of a junior member of a Nambudri illom was invalid in law as being opposed to the long-standing custom of the caste and that his wife acquired no legal rights under it. It is perhaps not so surprising that Mr. Wigram committed the same mistake (A. S. No. 562 of 76, District Court, Calicut), or that another Sub-Judge new to Malabar has recently considered it safe to follow these two decisions. It is absolutely wrong to suppose that any Nambudri, whatever his position in the family, is incapable of contracting a legal marriage. As a Hindu Brahmin he has the right to marry and according to his sacred Sastras, he ought not to consort with any woman without marrying her. The injunction of the Sastras is relaxed for economical considerations in Malabar in order to keep down the growth of the family. But the practice of the junior members not marrying is nothing more than the result of a social understanding. As a matter of fact even socially a junior member who marries would not be regarded as doing anything morally wrong except as having done a pecuniary injury to the family.

As a matter of fact where the senior fails to have children, the next senior member often marries, and even this justification is not required where the family is very rich and the number of members small. If a junior member of a Nambudri family does marry and has children by the marriage, it would shock the Nambudris to be told that the marriage connection is invalid in law, that the children are illegitimate and that the wife and children have not the same rights in the family property as if he were the senior member.

The leading difference between a Nambudri family and a Hindu family governed by the Mitakshara law on the East Coast is the absence of a right in the members of the family to demand a partition of the family properties. In this respect the law of the Nambudris is the same as the Marumakkathayam law. What is this difference due to? It is generally assumed that it is due to the acceptance by the Nambudris of the law of non-partition which they found prevailing amongst their Marumakkathayam brethren. This view is an altogether unproved and unnecessary assumption. For the law of non-partition is nothing peculiar to the Marumakkathayam law. It was the archaic or ancient Hindu Law which prevailed everywhere in India, though except in Malabar, the Hindu Law in this respect was subsequently modified and the right to division of joint property recognized. Now the migration of the Nambudris to Malabar must have taken place very long ago. The exact date has not been fixed with any amount of historic certainty. But there can be no doubt that it must have been not less than 1,200 years ago. This is the view accepted by the High Court of Madras in *Vasudevan v. The Secretary of State for India*¹. Mr. Logan in his *Malabar Land Tenures* is of opinion that the Nambudris "had already in A. D. 774 obtained commanding influence in the country," See page 12 of his *Malabar Land Tenures*. He says: "It is doubtful if the Chinese traveller Hwen Thsang's Kingdom Mo-Co-Kintchá (Malakouta) can be identified with Malabar. But, however, this may be, it is certain that Hwen Thsang either found no Vedic Brahmins at all in South India, east of the ghats, or in such numbers and influence as not to deserve mention. Of course, this does not prove that they were not at that time settled on the west of the ghats. It is, however, extremely improbable that if Vedic Brahmins had at that time (A. D. 629—645) been settled

1. L. L. R. 11 M. 157 (180—181).

on the West coast in such large numbers and in such commanding power and influence as their descendants now assert, the fact would not have been noted by Hwen Thsang, who was particularly alive to Brahmin intrigue and artifice as brought under his personal observation at the Court of Siladitya. Then again we know as a matter of fact that the Brahminical hierarchy did not attest the Jew's settlement deed at Cranganore and we know that the hierarchy did attest the later grant made to the Syrians at the same place. It is reasonable, therefore, to conclude that the Brahminical hierarchy had, in the interval between the dates of those two deeds, acquired the power and influence which has never since deserted them. If this reasoning is correct, then the rise of Vedic Brahmins in this coast may be placed not earlier than the latter half of the 7th or beginning of the 8th century and not later than A. D. 774."

The conclusion that the date of their migration ~~could~~ not be later than the date fixed by Logan is strengthened by the circumstance that it must have been prior to the birth of Sri Sankaracharya. The presumption is that the Nambudris carried with them into their new home the Hindu Law as it prevailed at the time of their migration in the place from which they went, whether it was the Tamil country or the banks of the Godavari, or the Tungabhadra. What then was the state of the law at the time of their migration? The Mitakshara was written certainly long after the Nambudris had gone to Malabar. The right of the sons to a share in the family property while the father is alive was not then recognised. Compulsory partition was unknown. All the members of the household, both males and females, were under the protection of the patriarch, who had absolute control over the property. It is hardly likely that the members were recognised as having any right except to be maintained at the expense of the joint family property, and in this respect both males and females were alike. The law of non-partition was therefore carried by the Nambudris to Malabar as part of the law which governed them in their own country, and it is unphilosophical to suppose that they borrowed that law from the Marumakkathayam inhabitants of Malabar. The Marumakkathayam law is no doubt the old Hindu Law, in the same manner as the Nambudri Law is, but there is no justification for assuming that the Nambudris are indebted to the Marumakkathayam

law for the principle of non-partition which governs them.

A question which has frequently arisen is whether the principles of the Marumakkathayam law or of the ordinary Hindu Law are to be applied in disputed cases to the Nambudris. It has sometimes been loosely said that the ordinary Hindu Law should be applied unless any custom is proved to displace it in any particular respect. In *T. Sivithri Andarjanom v. M. Vasudevan Nambudripad*² where it was assumed that the ordinary Hindu Law according to which a widow is incompetent to alienate property inherited from her husband, in all cases even as against the crown, in the absence of adequate necessity justifying the alienation, applies also to the Nambudris³. And unless custom is proved, the principles of the Mitakshara Law as it now obtains in the Madras Presidency, have been applied to the Nambudris, and the onus has been laid on the party asserting that that law is not applicable to them. With all respect we cannot but think that this is proceeding on an erroneous basis altogether. It may be that if it is contended that any fundamental principle of Hindu Law such as it was in ancient times before the Nambudris went to their new homes is inapplicable to them, it would be right to hold that the onus lies on the party asserting that a principle which was applicable to all Hindus from the earliest times is not applicable to the Nambudris. But it would not be right to apply the same rule when it is sought to apply the rules of Hindu Law which are not so ancient and which are the result of modern developments of that law. In such cases the court has to decide whether there was any definite rule of Hindu Law applicable at the time of Nambudri migration into Malabar, and whether that rule has been subsequently adhered to. The question in such cases is not whether any usage that is pleaded satisfies the tests of a custom displacing the written law, but whether the evidence let in is such as to show that the usage pleaded has been observed as law. That is, the court has to find out what is the law by the evidence let in as to usage and not to decide whether there is such proof of usage as to show that it has displaced any rule of law to the contrary. This

1. *Agnitharathan v. Itticheri*, 1 M. L. J. 308.

2. 1. L. R. 3 M. 215.

3. *Vishnu v. Krishna*, 1 L. R. 7 M. 3; S. A. 495 of 1900; S. A. 1821 of 1897; and *Paramaswaran Potti v. Matthen*, 6 T. L. R. 143.

was the view acted on in *Barichan v. Perachi*.¹

One question that has often arisen in which the correct principle to be applied would be of great importance is whether the female members of a Nambudri family have ownership in the property in the same manner as its male members have. Suppose for instance a gift is made of a portion of the family property, is it invalid in the absence of the consent of its female members as it will be if the male members do not consent to it. If the rule of the ordinary Hindu Law be applied, the consent of the female members will be unnecessary, for, according to it, the ownership vests only in the male members, and the female members have only the right to maintenance, and will be entitled to object to an alienation only if it affects their right of maintenance, and not otherwise. But would it be right to apply it to Nambudri families? As already pointed out, in the patriarchal state of the law, males and females were in much the same position, the right of ~~all~~ except the patriarch was only to maintenance. When he died, no doubt, another male member would succeed to his position, and a female might be disqualified for that office. That is, males would have a superior right to manage the family estate, and only in the absence of males would the females be entitled to manage. But this is only the recognition of a superior capacity in the male to manage and does not to our mind appear to show any superior ownership in him. Individual rights of alienation being unknown and a right to partition not having come into existence, the only tangible right of the junior members, barring the right to succeed to the management in their turn, was the right to maintenance, just as it is in the present day in the Marumakkathayam Tarwad of Malabar. It is undisputed that in the Marumakkathayam Tarwad the female members are as much proprietors of the family property as the males. Nay we find it often said, as we had occasion to point out before, that the proprietorship vests in the female members only, and that the males have no ownership.

T. L. Strange in his *Manual of Hindu Law* (p. 100) says, "In theory the property is held to vest in the females only, the males having right of management and claim to support. Practically the males are co-heirs with the females. In default of males, females

1. I. L. R. 15 M. 281 See also *Sri Braja Kisora Deva Garu v. Sri Kundana Devi Patta Mahadevi Garu*, I. L. R. 22 M. 431 (P. O.)

succeeded to the management of family property." It evidently did not occur to the learned author how the males could claim a right to manage the property in which they have no right of ownership. He was evidently confusing the principle of succession to the property of the tarwad with the principle of ownership in the property. Succession is traced only through females, but that is no argument that the male members have no rights of ownership in the family estate. Both are in the same position in that respect as we believe they were everywhere under the ancient Hindu Law. Manu says Chapter VIII, 416. "Three persons, a wife, a slave and a son have no property. Whatever they acquire belongs to him under whose dominion they are." Narada says "women, sons, slaves and attendants are dependent." Narada Part I, ch. V, Sloka 36. Gradually no doubt the ideas of individual property developed while the position of women became distinctly inferior for a time, and she was not allowed the benefit of the change by which individual ownership was recognised in all the males of the family. The males became entitled to demand partition as a matter of right of all ancestral property. But the female members were not allowed the same rights. In Bengal the mother is no doubt entitled to a share on a partition between the sons. But she cannot claim a partition herself and has to wait for the sons effecting a division between themselves to enforce her own right to a share. In Madras even this right is not recognised, and the mother is entitled only to an allotment for maintenance. The wives of deceased co-parceners are entitled only to allotments for maintenance in Bengal and in Madras, and the sisters are entitled only to maintenance until marriage and to the expenses of their marriage. Where the males all die, the widow of the last co-parcener occupies the lucky position of succeeding to the whole property, while the widows of the co-parceners who died previously are only entitled to maintenance at her hands. It is doubtful whether this position is warranted even by the principles of the Mitakshara or any other modern commentary of weight. See the judgment of the majority of the Travancore High Court in *Kooppoo Ammal v. Rukmani Ammal*¹ which agrees with the view held on the same question by the Chief Court of Baroda in *Bai Ugant v. Bai Rukshmani*. We think that according to the Hindu Law as it stood before the Nambudris went to Malabar

all the members of the family, both males and females, were equally interested in the family property and that the law of non-partition having continued to be the law amongst the Nambudris the female members of a Nambudri tarwad are equally entitled, with the male members to the property of the Tarwad. The question becomes important in two classes of cases (1) where an alienation is impeached as not binding on the family, and (2) in cases of right to succeed to management where there are no adult males competent to manage. The Madras and the Travancore High Courts hold different views on the first question. The Travancore High Court held in an early case *Parameswaran Potti v. Matthian*¹ following the ordinary Hindu Law, that the wife of a Nambudri is not entitled to call in question an alienation made by him where her right to maintenance is not jeopardized, and that she is not entitled as a co-owner of the property to set aside an alienation on the ground that it is prejudicial to the Tarwad. But this view has been overruled by the full bench of that Court in *Devaki Antarjanom v. Sambhu*². The court observed: "It is contended on behalf of the appellant on the analogy of the rule of Hindu Law that it is only when her right to maintenance is affected that a female member can question the alienation by a male member. But the Nambudri ladies possess greater rights than a right to maintenance, and if the property of a Nambudri illom is impartible and is intended to be enjoyed by the members of the illom both male and female from generation to generation, the only way of preserving the property from needless waste is by empowering all the members interested to see that the property is not wasted or alienated by the manager for the time being." The Court goes on to observe that the local custom also was in favour of recognition of equal proprietary right in male and female members. The decision of the Madras High Court to the contrary effect (second appeal 1821 of 1897) is unreported. We do not think that the court will find it a strong impediment in arriving at a different conclusion.

In another unreported case a question arose between the widow of the last male member of a Nambudri illom and the widow of an earlier deceased member, whether the former was entitled to give her daughter in the Sarvaswadanam form, thus making the issue of

1. 6 T. L. R. 143.

2. 12 T. L. R. 46.

the daughter a member of the illom without the consent of the widow of the earlier deceased co-parcener. The court held¹ that in the absence of proof of a custom to the contrary, the whole property of the tarwad vested in the widow of the last co-parcener and that, therefore, the consent of the widow of the previously deceased co-parcener to the marriage was unnecessary. This proposition was rested on the decision of the court in *Vasudevan v. Secretary of State for India*.² But it is submitted that that case is no authority for that position. For it is pointed out therein that the Hindu Law applicable to the Nambudris is the law as it stood before their migration to Malabar. The Mitakshara had not been written then, and the rules of the Mitakshara have no operation as against them. The court said: "But it must be remembered that the personal law which they carried with them was the Hindu Law as received by the Brahmins at the time of their settlement in Malabar and that it is not the law as modified by customs which have since come into prevalence among the Brahmins on the East Coast," and as already pointed out it is by no means clear that according to the archaic Hindu Law which prevailed before the colonization of Malabar by the Nambudris the women of the family had less rights than the males excepting the patriarch.

It must be admitted however that if women are recognised to have equal rights in the tarwad property with men, questions may arise as to precedence with respect to rights of management which it may not be easy to solve. In a Nambudri family owing to the absence of compulsory infant marriage and owing to marriage there being really optional, the females of the family would or might consist partly of women born in the family who have not been married away and women who have come into the family by marriage. The former class must be regarded as having equal rights with the latter though they might cease on marriage. Again a woman coming into the family by marriage may be older than another woman that was married into the family earlier. A widow of the father may be younger than a widow of the son: (It should be remembered that Nambudris sometimes go on marrying late in life). Suppose there are no adult males in a Nambudri family, how are we to determine which of the ladies are entitled to succeed to the

1. S. A. 765—766 of 1892.

2. I. L. R., 11 M. 157.

management. In a Nair family no such difficulty arises. All the women are born in the tarwad and seniority in age is the only test. But how is the question to be determined in the case we have put in a Nambudri family. We think we may put out of consideration the ground that one widow was married to the father while the other was married to the son. We do not think that the superior social or religious position of the father's widow would be any ground for recognising any preferential right in her to the management of the family property. It is not a ground for preference in Nair families. Thus a woman's mother's sister may be younger than herself, but it does not give her any title to be preferred to her niece to the management of the tarwad property, as it does not amongst the males either. And amongst the Nambudris too as between males there is not the slightest doubt that seniority is the only test of the right to management. But it is more difficult to decide whether seniority of age would give a right to management where another woman has been brought into the illom earlier. The point is bare of all authority. But in our opinion the woman that is first married into the house must be held to have superior rights. According to ordinary Hindu Law in the case of impartible estates, seniority in point of marriage gives a preferential right amongst widows. It would moreover be very unreasonable to hold that an old woman (for women may be married late among Nambudris) who has just become a member of the house should displace younger women who have long been members of the illom. The latter are senior in the illom. The same principle is applied in determining cases of seniority as between ascetics of the same mutt in Malabar as elsewhere; the most senior disciple and not the oldest disciple succeeds to the headship of the mutt and its properties. The genius of the Hindu Law as it prevails both in Malabar and elsewhere is certainly in favour of holding that as between widows of the family, seniority of membership in the family should determine all questions of precedence as to rights of management. We think a similar principle is applicable as between women born in the house and women brought into it by marriage. The question would be who is the earlier member of the illom. If the woman born in the illom was born prior to the marriage of the woman who became a member of the illom by marriage, she would be entitled to succeed to the right of management in preference to the

later accession to the illom. We are not aware of any better principle that could be applied to such cases. But in the absence of precedents, we cannot say we suggest these rules with confidence.

• We may refer to one point on which it has been held that the rule of Hindu Law is not applicable to the Nambudris. In *Nilakandan v. Madhavan*¹, *Brandt and Parker, JJ.*, held that the rule of Hindu Law, according to which the son is bound to pay the debts of the father, is not applicable to the Nambudris. The judgment however is based entirely on the finding of the Subordinate Judge of Calicut that the rule in question was not applicable. No objection was raised to the finding, and the High Court accepted the finding. It may moreover be doubted whether the point really arose in the case. A decree for the specific performance of a contract was passed against a Nambudri. He died after the decree and the execution of the decree was resisted by his widow and his two minor sons, the widow acting as their guardian. The decree-holder's petition to remove the obstruction was registered as a suit. The Munsif found that the debt was binding on the sons, having been incurred for the benefit of the family, but instead of passing a decree for possession gave a decree for the debt for the discharge of which the agreement to sell was entered into and in default for the sale of the house. The Appellate Court reversed the decree on the ground that the debt was not binding on the defendants. In second appeal it was contended that the defendants could not dispute the binding nature of the debt unless they proved that it was illegal or immoral. The High Court called for a finding on the question whether the Law applicable was the ordinary Hindu Law or the Marumakkathayam law or a combination of both, and, if the last, in what respect the law as affecting the liability of the defendants differed from the ordinary Hindu Law. The Sub-Judge found that it had not been proved that the law compelling the son to discharge all debts of the father which are not illegal or immoral was binding on the Nambudris. Now the question raised would not decide the liability of the widow who was one of the defendants in the suit. The High Court itself did not decide as a matter of law or usage that the rule in question did not apply to the Nambudris. It is no doubt true that where the family consists both of sons and of other members the rule of the son's liability to pay the father's debts would be absolutely

inapplicable. The sons not being entitled to partition have no saleable interest in the property and the other members not being bound to pay the debt according to the rule in question, the whole of the properties is unavailable for the debt in question. But the question might be different where the family consists only of the father and the sons and their issue. We do not think that the case can be taken as deciding the point in such a case at any rate.

It may be taken that the rules we have discussed as to the rights and obligations of the members of a Marumakkathayam Tarwad are generally applicable to a Nambudri Tarwad also, with the important differences already pointed out. It has been shown that the essential difference between the ordinary Hindu family and a Marumakkathayam family, so far as the rights of the members of the family *inter se* are concerned, is that the members of a Marumakkathayam family have no right to demand partition of the family property and all other differences are in reality the result of this essential difference. The Nambudri family and the Marumakkathayam family being similar in this respect it follows that similar rules are applicable to both.

We must mention in conclusion that there are some Nambudri families in North Malabar that are governed by Marumakkathayam Law in so far as rights of property are concerned. It is hardly necessary to observe that with reference to the subject-matter of this article they differ in no material respect from the Sudras who follow the Marumakkathayam Law.

NOTES OF INDIAN CASES.

Uma Charan Singh v. Emperor, I. L. R., 29 C. 244.

We have some doubt as to the decision in this case. The Calcutta High Court basing its conclusion upon the illegality of the warrant have held that persons who resist the execution of such warrant are justified in so resisting and are not guilty of an offence under section 147. The warrant in the particular case, it is stated, made no specific mention of the judgment-debtors who resisted the warrant and did not specify the particular property to be attached. The warrant did not also purport to give the peon

authority to enter into the house of those judgment-debtors for the purpose of attaching their property. The Calcutta High Court, therefore, held that a warrant which did not on the face of it authorize the seizure of the judgment-debtors' goods by the peon was not a warrant which could be executed then. We do not think the Calcutta High Court was right upon this point. S. 235, C. P. C., provides that the application for execution should contain the particulars stated therein and S. 236, C. P. C., states that in case application is made for the attachment of moveables belonging to the judgment-debtor, *but not in his possession*, the decree-holder shall annex to the application an inventory of the property to be attached containing a reasonably accurate description of the same. Apparently the Code does not want a list when application is made for attachment of the judgment-debtors' moveable property when it is in the possession of the judgment-debtor. Section 250 then states that on the preliminary steps required by the Code being taken, the court shall, unless it sees cause to the contrary, issue its warrant for the execution of the decree *i. e.*, if the application is for the arrest of the debtor, then for such arrest and if for attachment of moveables, then for such attachment. Section 251 then states that the warrant shall be dated the day on which it is issued, signed by the judge or other officer sealed with the court's seal and delivered the proper officer to be executed. Here again there is no provision that the property in the possession of the judgment-debtor should be specified in the warrant. This is but consistent with reason. Apparently the Code intends that there should be a general warrant so that property in the possession of the debtor sufficient to satisfy the decree may be attached. It may be that the decree-holder is not able to know what property is in the possession of the debtor. What is he to do? Section 269 provides the mode in which this attachment is to be effected, and so far as we can see there is no other provision in the Code relating to this matter. Of course when the property is not in the possession of the judgment-debtor and the decree-holder asks for attachment of the same, it is but reasonable to insist on an inventory being given and a copy of the same will either be attached to the warrant or a list may be annexed to the warrant as part of the same.

But if the property is mentioned, the Code makes no provision that the person in whose house it may be should be mentioned, and

there is no necessity that in order to authorize the bailiff to enter a house the warrant should name the person who is the owner or occupier of that house. If the bailiff is authorized to attach moveable property not in the possession of the judgment-debtor, it is a general warrant to him to attach it in whosoever house it may be. Of course the form states that the name of the person against whom it may be executed shall be inserted. This may be so even assuming that from the form you can imply some rule which is very doubtful. It can scarcely be said that the absence of such insertion stamps the warrant with illegality and renders it unexecutable. Can the Amin disobey and return the warrant unexecuted for such defect? If the judgment-debtors are ascertainable and there is no reasonable doubt that the persons against whom it is executed are judgment debtors and application for execution has been made against them and the court has ordered such execution against them all without refusing execution against any, we do not see how a warrant issued under such circumstances is illegal merely because there is no specific mention of one judgment-debtor. Of course, if the court intended that execution should go against one judgment-debtor and then against another and so on and the warrant is given under such circumstances against one, then it may be the amin has no warrant which he can execute against the others. It is also true that an amin cannot levy execution against persons who are not judgment-debtors. Unless the facts come under any of the above two classes we do not see how any defect in the warrant will justify resistance to the execution of the same. Can the judgment-debtor apply to set aside the attachment for such formal errors if any. Section 99 of the Penal Code clearly lays down that there is no self-defence when the act is done by a public servant in good faith under color of his office. The observations of Blackburn, J., in *Regina v. Allen*¹ quoted with approval in *Queen-Empress v. Tiruchittambala Pathan*,² are well worth perusal on this aspect of the case.

Rajomoyee Dassee v. Troylukho Mohiney Dassee, I. L. R., 29 C. 260.

We think the decision in this case on the two principal points decided herein, viz., the validity of the bequest to an idol and the validity of a bequest to a class, some of whom are in existence and

1. See Stephen's Digest of the Criminal Law, pp. 366—374.

2. I. L. R. 21 M. 78 at 82.

some not, is not altogether correct and requires further consideration by the court of appeal should the case be taken up there. It is well settled law that gifts to idols are valid and can be enforced and that the rule as to perpetuities does not apply to such gifts. It is also well settled that bequests for the building of temples are valid and courts in India must and do give effect to the same. See *Ramtoonoo Mullick v. Ramgopal Mullick*¹. In fact in this very case Mr. Justice Stanley held that a direction in a will to establish a Thakoor at such a place as the executor should think fit is a valid direction. If this be so, it seems to us impossible to conceive how a gift for the sustentation of worship or for the sheva of the idol after it is established is not valid. What is the use of establishing a Thakoor without making due provision for the Thakoor when established? It seems hardly good policy to help in bringing a thing into being only to let it die or starve the next day without the means of sustenance. That is exactly what has been done in the Calcutta case. The direction to establish a Thakoor has been held valid, whereas the direction to give the residue of the testator's estate for the sheva of the Thakoor when established has been held invalid. We do not think there can be any difference in principle between the two cases. Either both are invalid or both valid. Probably there may be much force in the observation of the Madras High Court in *Colgan v. Administrator-General of Madras*,² "that if the matter were *res integra*, general principles would seem to suggest no reason why a Hindu or Muhammadan should be allowed to dedicate property in perpetuity for the services of his religion or the maintenance of the tombs of his family and a Christian should be forbidden to do the same." But the courts have gone too far in favor of relaxation in the case of Hindus and Mahomedans to recede. How does this matter differ from a gift to charity generally, where the Court frames a scheme and allots funds for the support of such scheme? The principle upon which gifts to idols are upheld also rests on the same footing. If the rule in the *Tagore* case does not apply to a bequest for the establishment of the Thakoor, how can it apply to a further bequest for the sustentation of the Thakoor when established? The decision in *Upendra Lal Boral v. Hem Chandra Boral*³ which the learned judge follows in this case, does not attempt

1. 1 Knapp. 245.

2. I. L. R., 15 M. 424 at 447.

3. I. L. R., 25 C. 405.

to answer any of these points. We cannot understand how the rule in the Tagore case can be applied to gifts to charities and to gifts to idols or other religious purposes which stand on the same footing as charities. In fact in English Law charitable purpose will also include a religious purpose. It is said that an idol cannot be said to have juridical existence unless it has become consecrated by appropriate ceremonies and so has become spiritualized. See *Doorgah Prashad Dass v. Sheo Prashad Pandah*.¹ We very much doubt whether courts of law, especially in India where there is no State Church, have any jurisdiction to enter into the question whether an idol has been so consecrated. Supposing the ceremonies have been improperly done, are courts of law to decline to treat such idols as capable of accepting bequest and gift? Again, is a gift to be invalidated by adducing evidence to show that though worship has been carried on as a matter of fact, the idol must be regarded as non-existing from a religious point of view, because the idol was not consecrated and spiritualized by appropriate ceremonies? We think all such questions are outside the pale of the civil courts, and it is idle for courts to discuss the question whether ceremonies have been done, and if so, whether the right ones were ever used. But even assuming that the view taken in 7 C. L. R. is right, we do not see why effect should not be given to a bequest to establish an idol and to maintain it when established. The case of *Gokool Nath Guhe v. Issur Lochun Roy*² is a direct authority in favor of this view and apparently it has been considered neither in this case nor in the case of *Upendra Lal Boral v. Hem Chandra Boral*.³

The other point decided in this case is that a gift to a class, some of whom are incapable of taking, is wholly void. The learned judge says that he will follow the principle laid down in the English case of ⁴ as the English rule has been applied in India to Hindu Wills and is consonant with Hindu Law. The learned judge forgets that their Lordships of the Privy Council have said that it is a highly technical rule, and that the rule of construction laid down in the English case is one which usually defeats the intention of the testator. *Rai Bishen Chand v. Mussumat Asmaida Koer*.⁵ If so, how is the English rule to be followed as a rule in consonance to equity

1. 7 C. L. R. 278.

2. I. L. R. 14 C. 222.

3. I. L. R. 25 C. 405.

4. 2 Mer. 363.

5. L. R. 11. I. A. 164 at 177.

and good conscience or to Hindu Law? If it be said that the Calcutta case was in respect of a will made in Bombay to which the Indian Succession Act (so far as the same has been made applicable to Hindu Wills in the Presidency Towns by the Hindu Wills Act, XXI of 1870) applied, we have the high authority of *Wilson, J.*, in *Rām Lall Sett v. Kanai Lall Sett*,¹ that the English rule ought not to be followed in India and that the Indian Succession Act makes the rule laid down in *Leake v. Robinson*² applicable only to cases of gifts to a class affected with remoteness under S. 101, or the cases mentioned in S. 100. In *Mangaldas Parmanandas v. Tribhuvandas Narsidas*,³ *Farran, J.*, held with regard to a will, the construction of which arose on the original side, that there were a primary intention and a secondary intention, that the primary intention was that all the members of the class specified should take, and the secondary intention was that if all could not take those who could do so should and that if the testator makes his secondary intention clear, the gift should be given effect to: see also *Khimji Jairam v. Morarji Jairam*,⁴ *Manjamma v. Padmanabhayya*.⁵ The learned judge, *Stanley, J.*, fails to consider this aspect of the case. Moreover if the case is governed by the Indian Succession Act, the provision in the will that the daughter should take $\frac{1}{4}$ th share in the house for life and after her death her sons in equal shares should take the same falls within the proviso to S. 100 or within the exception to S. 99. The provision in the codicil that they should have no power to alienate is simply repugnant to the estate given and will be void.

• In the matter of *Horace Lyall*, I. L. R., 28 O. 286.

In this case the Calcutta High Court has held that a judgment passed by a single judge refusing an application by a prisoner under sections 456 and 491, Criminal Procedure Code, for release from alleged illegal custody under a sentence of imprisonment (the sentence being legal) is appealable under section 15 of the Letters Patent, as not being a sentence or order made in any criminal trial though it may be a sentence or order in a criminal matter. It was tacitly admitted that no question could arise if the matter was one arising in a civil proceeding. But

1. I. L. R. 12 C. 603.

3. I. L. R. 15 B., 652.

5. I. L. R. 12 M., 393.

2. 2 Mer. 363.

4. I. L. R. 22 B., 533.

in Madras even this was questioned, and there are numerous unreported judgments in which the Madras High Court has till very recently buried all appeals from a mistaken assumption as to the construction of this clause, and partly also from a tendency to keep down file. Letters Patent Appeal No. 22 of 1897 Jud. Index for 1897 p. 250 is, we believe, the last instance of the kind in the *regime* of the late Chief Justice wherein it was held (by *Collins*, C. J. and *Shepherd*, J.) that a sanction granted by a single Judge of the High Court for prosecuting a witness (the defendant in the case) for perjury in a *civil proceeding* is not appealable under section 15. It is a matter of extreme satisfaction to find that a Full Bench of the Madras High Court has set right this hobby until now prevailing in that Court. The Full Bench has held, following the judgment of the Full Bench of the Calcutta Court in the case under consideration that a sanction for giving false evidence in a criminal trial is appealable under the Letters Patent as being a judgment passed in a criminal matter. Of course granting or refusing of bail *pending* a criminal trial or appeal will stand on a different ground. It will be a sentence or order passed in a criminal trial and may not be appealable under the express wording of S. 15.

Bahir Das Chakravarti v. Nobin Chunder Pal, I. L. R., 29 C. 306.

In this case the Calcutta High Court held that a decision by a person appointed Commissioner in pursuance of an agreement by the parties, that a decree should follow in accordance with his finding as to possession, cannot be set aside by the Court on appeal. The parties have chosen to make the Commissioner practically their arbitrator, and they cannot afterwards back out of it when they find the Commissioner's finding is against them. Of course there may be no specific provision in the code on this matter and a Commissioner ordinarily appointed under Chapter XXXV of the Civil Procedure Code (see section 392) may have no such powers. The case of *Watson v. Aga Mahomed Sherazee*¹, is, we think, exactly in point.

1. L. R. 1 I. A., 346.

Hara Lall Banerjee v. Nitambini Debi, I. L. R., 29 C. 315.

Clause 12 of the Letters Patent has been the frequent subject of decision in the Indian Courts, and this case goes to add one more to the existing list. The defendant in the suit obtained probate of her husband's will from the original side of the High Court, Calcutta, alleging in her application that some moveable property was within the jurisdiction of the High Court. The plaintiff now sued the defendant as executrix for construction of the will, for the administration of his estate, for an account and for a declaration that under the terms of the will he is entitled to immediate and absolute possession of certain moveable and immoveable properties. The Calcutta High Court properly held that the suit was 'a suit for land' within the meaning of clause 12 of the Letters Patent, and that the immoveable properties being outside the original jurisdiction of the High Court, the suit was not maintainable in the High Court, even though the defendant may have been resident within the jurisdiction. The learned judge deciding the case very properly observed that the jurisdiction of the court, as a Court of equity, to grant relief *in personam*, did not alter the nature of the suit. He apparently holds that this is not a mere administration suit, but that this is a suit substantially for land or other immoveable property. In *Nistarini Dasi v. Nundo Lall Bose*¹, the Calcutta High Court held that an administration suit was not one which is strictly a suit for land within the meaning of clause 12 of the Letters Patent, though the executors might be guilty of mal-administration with reference to assets outside the jurisdiction, and that the court would assume jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam*, either to compel the owner to give effect to legal obligations into which he might have entered or a trust reposed in him. It was admitted, however, that if the trustees or executors had assigned the properties to strangers and recovery of the same were sought, the suit would be a suit for land. A suit for filing an award has also been held not to be a suit for land, though the award may deal with immoveable properties outside jurisdiction. *Kellie v. Fraser*². The Madras High Court has followed this decision in *Seshayya Chettiar v. Chengayya Chettiar*.³

1. I. L. R. 26 C., 891.

2. I. L. R. 2 C., 145.

3. I. L. R. 24 M., 81.

SUMMARY OF RECENT CASES.

Admiralty—Collision—Docking for repairs—Improvement by owner—Contribution.

The Acanthus [1902], P. 17.

A person is not bound to contribute unless there is a legal obligation on him to do so. The fact that one person has derived an advantage from the act of another is by itself no ground for the claim of contribution. See *Ruabon Steamship Company Case*.¹

A ship damaged by collision was put into dry dock for repair. The owners of the ship utilised the occasion for improving it by filling it with bilge keels. But there was neither delay nor any increased docking expense on that account. *Held*, following the *Ruabon case* that the owners were under no obligation to contribute to the docking expenses.

Bailment—Loss of chattels bailed by negligence of stranger—Claim by bailee for value of goods or chattels—Bailee's possession.

The Winkfield [1902], P. 42.

The possession of a bailee is good against a wrongdoer, and the latter cannot in an action by the bailee set up any *jus tertii* unless he claims under it.

The bailee can recover in an action on the case against a wrongdoer the whole value of the goods for their loss through the tortious conduct of such wrongdoer. The latter not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and the bailee.

In an action against a wrongdoer for loss of goods caused by his negligence, the bailee in possession is entitled to recover the value of goods, notwithstanding he would have had a valid defence to the bailor's action for damages against him for such loss.

*Olaridge v. South Staffordshire Tramway Co.*² overruled.

Obiter:—If the bailee recovers the whole value of the goods from the wrongdoer, the former is accountable to the bailor.

[The above position seems unassailable. The same result will follow in Indian Law. Section 180 of the Contract Act exactly

1. 1900 A. C. 8.

2. 1892. 1 Q. B. 422.

covers this case, and the obiter is supported by section 181 of the said Act. That the bailee may himself not be responsible will appear from sections 151 and 152. That is, however, not the test of liability of a wrongdoer and does not disentitle the bailee from recovering under section 180—Ed.]

Probate—Action for revocation for fraud—Fraud of person not a party to prior proceedings—Res judicata.

Birch v. Birch [1902], P. 62.

A suit may be brought to set aside a probate on the ground of fraud in any division of the High Court. The fraud which vitiates a probate in a separate suit is not a fraud on the testator, for that is a matter triable in the course of proving a will but a fraud on the next of kin. It is not necessary in such a suit to allege fraud on the parties to the former action. It is enough if fraud is alleged against persons who, though not parties, are interested directly or indirectly in the establishment of the will and are bound by the decree in the probate suit.

A number of persons who may be interested in the probate proceedings, though they may not be directly brought before the court, will be bound and will not be allowed to question what has been decided, provided they have notice of the proceedings and are aware that they are going on, so that they have the opportunity of intervening and taking part in the proceedings [cf. *Rahimatulla Sahib v. Rama Row*.¹ and In the matter of the *Petition of Bhobosonduru Dabee*.²—Ed.]

Probate action—Costs—Executors.

Twist v. Tye [1902], P. 92.

When executors being also residuary legatees and having had ample opportunities of forming an opinion as to the testamentary capacity of the testatrix, whose estate they were managing during her lifetime, act upon their opinion and propound a will, which is pronounced against on the ground that the testatrix had no sound disposing state of mind, the Court, not merely should direct that the costs of the executors should not be allowed out of the estate but they must pay the costs of the defendant on the principle that costs should follow the event. They are, however, not liable to pay the costs of any of the parties cited when the interests of the latter are identical with those of the defendant.

1. I. L. B., 17 M. 337.

2. I. L. B., 6 C. 490.

Soldier's will—Testamentary document—Mobilization—‘in expeditione.’—Wills Act S. 11.

Gattward v. Knee [1902], P. 99.

The question whether a paper written by the deceased is a testamentary document depends upon the intention with which the document was written.

A letter by a soldier to his wife just after the order for mobilization is received and before going to South Africa containing the expressions, ‘If you have a letter to say that I am killed, then the lot is for you’..... ‘you will receive the lot if I am killed in action, for I shall make out my will in your favour’, is a testamentary document notwithstanding the writer had it in his mind to write a more formal will and such letter must be admitted to probate as the last will of the deceased when no other document in the nature of a will is received or discovered.

A mere warning for active service will not be sufficient to entitle a soldier to claim the benefits of writing a privileged or soldier's will within the meaning of sec. 11, Wills Act (Vict. C. 26).

Mobilization may be fairly taken as a commencement of that which, in Roman law, was understood by the words ‘*in expeditione*’. These words meant something more than the English words ‘*on an expedition*’ for when a force begins in a sense to engage in or to enter upon active service, it would be said to be ‘*in expeditione*’. If the order to mobilize has been received, although any particular member of the force may himself have taken no step under it, yet the order itself so affects his position, as a unit of the whole force, as to place him ‘*in expeditione*’.

Where ‘therefore a battalion stationed in Calcutta was warned for service and some days’ after was ‘ordered to mobilize for active service for South Africa and embarked immediately after a private soldier will be entitled after such order for mobilization to claim the benefits of writing a privileged will.’

• [In India in Cases governed by the Indian Succession Act the matter is governed by section 52 of the latter Act. The letter written by the private in the above case will be a privileged will according to that section. The words of the section are ‘any soldier being employed in an expedition, or engaged in actual warfare and after the order to mobilize is received. * * * The private is a soldier who is employed in an expedition’ within the meaning of the section

The letter in this case will also be in India a testamentary document which can be admitted to probate. Cf. section 53, clause 3, para 2 and clause 4—Ed.]

Will—Construction—Money.

In the Goods of Bramley, [1902], P. 106.

The meaning to be attached to the word 'money' occurring in a testamentary document is not absolute and technical but will depend upon the context and surrounding circumstances. It may mean all the testator's personal estate.

Wills—Power of appointment exercise of by first will—Subsequent will—No reference to Power—No clause of revocation—Words 'give, devise, bequeath and appoint.'

Kent v. Kent, [1902], P. 108.

The mere fact of making a subsequent testament does not work a total revocation of the prior one except in 2 cases (1) where the later document expressly or in effect revokes the prior one or (2) when the two documents are incapable of standing together. If the later testamentary document be inconsistent only partially with an earlier one, then such later instrument will revoke the former, only as to those parts where they are inconsistent.

Where a testator made first a will reciting a power of appointment and purported to exercise such power and subsequently made a will which contained no clause of revocation and no reference to power but purported to "give, devise, bequeath and appoint" all his real and personal estate by such will.

Held that the word 'appoint' was a sufficient exercise of the power under the circumstances, and that the second will impliedly revoked the first.

Will—Executor by implication—Direction to pay debts.

In the goods of Pamela Cook, [1902], P. 114.

Where there is a legatee of the whole estate, and the trustee is directed to pay debts and legacies, he is to be treated as an executor. But where the legatee is for part of the estate, the same rule will not necessarily apply. A simple direction, however, to a certain person to pay debts of the testatrix out of her estate, without any bequest to him and without specifically appointing him as trustee may be enough to constitute him an executor according to the tenor or by implication.

Conflict of Laws—Domiciled foreigner—Leasehold—Administration with will annexed—Wills Act.

Pepin v. Bruyere, [1902], 1 Ch. 24 C. A.

Leasehold property in England will not pass under a will of a domiciled foreigner, if not attested as required by the Wills Act; and the grant of letters of administration with the will annexed on the Probate side will not make the will any more effective as regards such property.

Mortgage—Clog on redemption—Agreement Subsequent—Option to purchase—Conditional Sale.

Lisle v. Reeve, [1902], 1 Ch. 53 C. A.

The doctrine as to clog on redemption is applicable where the restriction alleged to be a clog is part of the mortgage transaction; the reason of the rule being that the mortgagee should not be allowed to take advantage of his position and impose any condition which will have the effect of destroying or limiting the right of redemption. But there is no reason why the mortgagee should not have the benefit of a subsequent agreement by which the mortgagor of his own free will puts an end to or limits the equity of redemption.

Power of Appointment—Exercise by will—Lease after will—Premium—Operation of appointment—Ademption.

In re Moses—Beddington v. Beddington, [1902], 1 Ch. 100 C. A.

An appointment by will, though it derives its force from the instrument creating the power, does not take effect until the death of the testator and will not take effect if the subject or object of appointment ceases to exist at the testator's death.

The doctrine of ademption applies to appointments by will whether under a general or a special power.

A tenant for life with a power of appointment first executed a will exercising his power and afterwards granted leases of appointed property for premiums paid by the lessees. The premiums having been received by the trustees of the settlement and invested by them, the question arose whether the appointees were entitled not merely to the appointed properties but also to the premiums received prior to the testator's death. It was held that in the absence of any provision in the will to that effect the premiums did not

pass under the appointment but should be disposed of as in default of appointment.

Friendly Society—Life Policy—Assignment—Nomination.

• *In re Griffin—Griffin v. Griffin* [1902], 1 Ch. 135 C. A.

In the absence of any statutory prohibition, the right of assignment which is an ordinary incident of property may be exercised in reference to policies; and the mere fact of a statute making certain kinds of policies assignable in a particular form does not exclude the possibility of other forms of assignment.

• It was held in this case that policies under the Friendly Societies Acts of 1875 and 1896, might be assigned not only by nomination as provided in the Acts but also by assignment in the ordinary way as in the case of all other policies, as there was nothing in these Acts to prohibit the ordinary form of assignment.

Vendor and Purchaser—Conditions of sale—Delay—Interest—Damages.

• *Jones v. Gardiner* [1902], 1 Ch. 191.

A purchaser who has agreed to pay interest on *default* to pay purchase money cannot be called upon to pay interest where the delay is not due to any fault of his but owing to the state of the vendor's title.

A purchaser can claim damages for delay in the completion of the purchase when such delay is caused by the vendor not having used reasonable diligence in the performance of his contract; but not when the delay is due to want of, or defect in, title or to conveyancing difficulties.

• *Costs—Action for damages—Public Authority—Payment as costs as between solicitor and client—Denial of liability as to all—solicitor and client.*

Smith v. Northleach Rural District Council [1902], 1 Ch. 197.

In an action for damages on several issues, the defendant paid money into court on one issue with a denial of liability altogether. The plaintiff did not immediately stop the action but finally ended by accepting the amount in complete satisfaction. It was held that the defendant should pay the costs in respect of that issue for which he paid the money and yet denied liability and that the plaintiff should pay costs in respect of the other issues which he proceeded with at first but finally withdrew.

Held also that the costs of solicitor and client allowed by S. 1 Cl. c. of the Public Authorities Protection Act were claimable only when the action was proceeded with *to judgment* but not when it was stopped earlier.

Will—Charitable bequest—Limited charitable purpose—External evidence—Residus.

In re Huxtable—Huxtable v. Crawford [1902], 1 Ch. 214.

Where a testatrix by her will bequeathed £ 4,000 to A 'for the charitable purpose agreed upon between us,' it was held that there was only a limited charitable gift and that external evidence would be admissible to prove the limitation. It seems that if the instrument left the moneys generally for charities external evidence would not have been admissible to import any limitation on the general charitable intents.

It having been found on the evidence that a charitable bequest of the income during A's life alone was intended, it was held that on A's death the corpus would fall into the residue of the estate.

Vendor and purchaser—Conditions of sale—Interest on purchase money—Wilful default—Dispute as to wording of conveyance—Profits.

Bennett v. Stone [1902], 1 Ch. 226.

Where by an agreement to sell property it was provided that the purchaser should pay interest on the purchase money if the completion of the sale was delayed owing to any cause *except the wilful default of the vendor*, the question was raised whether the delay arising from a dispute as to the wording of the conveyance in which it was found that the vendor was in the wrong was not owing to the wilful default of the vendor within the meaning of the condition. *Held* referring to *In re London Corporation and Tubbs' contract* [1894], 2 Ch. 524 that *bona fide* mistakes as to the wording of the conveyance equally with similar mistakes as to title do not constitute wilful default and that the vendor was entitled to interest.

After the action for specific performance was commenced one of the farms fell vacant and the vendors paid the valuation of the out-going tenant and occupied it themselves. The order of the court awarded rents and profits to the purchaser but not on the

footing of wilful default. *Held* that the vendor was not bound to pay occupation rent but only the rents and profits and the proceeds of sale of crops actually received less the amount paid for the valuation and the expenses incurred in the realisation of crops and that he was not entitled to set off the losses incurred in farming the estate.

Vendor and purchaser—Trustee for sale—Retirement—Purchase after twelve years.

- *In re Boles and British Land Company's contract*
[1902], 1 Ch. 244.

A trustee for sale of land will not be allowed to purchase the land himself because he will then be placed in a position where his interests conflict with his duty. This disability to purchase could not be got over by the trustee retiring with the express object of purchasing the estate. But where for over twelve years a person has ceased to be a trustee there is no general rule that he cannot purchase the property. Of course, if there were any grounds of doubt or suspicion in regard to the transaction, they will be carefully sifted in determining the legality of the purchase. *Clark v. Clark*, 9 A. C. 788 considered.

Copyright—Encyclopaedia—Owner and Publisher—Copyright in contributions.

- *Affalos v. Lawrence and Bullen, Limited* [1902], 1 Ch. 264.

Defendants, a firm of publishers, for a lump sum employed A to edit a cyclopaedia and contribute certain articles to the same and C was asked to contribute articles at a fixed rate per thousand words. *Held* that there was nothing to show that the publishers were intended to take the copyright in these contributions; and the publishers were restrained from separately issuing these contributions in book forms.

Policy of Insurance—Policy made payable to another—Purchase in another's name—Intention Presumption Trust.

- *In re Policy No. 6402 of the Scottish Equitable Life Assurance Company* [1902], 1 Ch. 282.

A policy on his own life was taken by A "for the behoof of B," his wife's sister, and the policy gave her, her executors, administrators and assigns, the right to receive the policy moneys on the

death of A. B predeceased A, who retained the policy and paid the premiums till his death.

Held that the words "*for the behoof of B*" were not enough to show that she was intended to take a beneficial interest in the policy moneys and that in the absence of any clearer expression or proof of intention, B and her representatives should hold the moneys in trust for A's representatives.

Ancient lights—Substantial interference—Damage—Substantial injury—Remedy by injunction.

Home and Colonial Stores, Limited v. Colls [1902], 1 Ch. 302.

If ancient lights are interfered with substantially and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. In order that the plaintiff may have a right of action (for damages) there must be a substantial interference and in order that he may obtain an injunction, he must establish substantial injury suffered or threatened. There is no law that the plaintiff is entitled only to a standard or fixed amount of light. He must recognise the necessity of give and take in matters of this nature. There may be real damage to the owner or occupier of a building used for particular purposes or reasonably adapted for particular purposes, though there would be no real damage if the building were not so used or adapted.

In the case where the plaintiff asks for an injunction, it is the duty of the court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the court is satisfied that in that event the plaintiff would have a good cause of action, the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient lights.

It is settled that there is no rule of law that a man may always build up to an angle of 45 degrees, but in judging of the probable effect of a proposed building upon ancient lights the court may not unreasonably regard the fact that an angle of 45 degrees left as *prima facie* evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence.

Where the plaintiff's action for injunction for preventing the defendant from erecting upon his site, so as to obstruct and

interfere substantially with the plaintiff's right to ancient lights was dismissed by the 1st Court and the defendant completed the building notwithstanding that plaintiffs served the defendant with notice of their intention to appeal and the Appellate Court found that they were entitled to an injunction.

Held that the plaintiff was entitled under such altered circumstances to a mandatory injunction requiring the defendant to pull down anything erected in breach of the terms of the injunction which the plaintiff would have obtained if the building had not been completed.

Per *Vaughan Williams*, L. J.—The rule of 45 degrees cannot be regarded now even as a rough measure of the right of the owner or occupier of ancient light.

Administration—Trustees carrying on testator's business—Defaulting trustee—Claim by creditors of business.

In re Firth—Newton v. Rol [1902], 1 Ch. 342.

In the administration of an estate where the testator's business has been carried on after his death, before an enquiry can be directed as to who are the creditors of the business, it must first be shewn that the business has been carried on by the trustees either under a power in the will or with the consent, express or implied, of the creditors of the testator.

Where an inquiry is directed and the debts of the business have been ascertained and the trustee's accounts are clear, the creditors of the business are entitled to be paid in priority to the creditors of the testator.

The creditors are entitled upon payment of any money owing by the trustees to the estate to an assignment of the equity to which the trustees succeed on clearing their accounts (*viz.* indemnity). The creditors of the business have no right whatever against the estate, but they have a right to sue the trustee who has incurred the debts. If the trustee has a clear account and has a right of indemnity against the estate, the creditor is subrogated to that right. The latter may sue the trustee and may claim the benefit of the indemnity to which the trustee is entitled out of the estate.

But if the trustee is in default and has not got the right of indemnity, then the creditor can get nothing, because he is relying on an equity which does not exist.

Where there are several trustees the law gives this right to indemnity to the trustees severally and not as a body.

The right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter.

Company—Dividend not declared—Fixed capital—Floating capital—Dividend to be paid out of profits.

Bond v. Barrow Haematite Steel Company [1902], 1 Ch. 353.

'Interest' in the articles of association of a company may mean 'dividend' though, in some cases fixed capital may be sunk and lost without precluding payment of dividends or division of the excess of current receipts over current payments. Circulating or floating capital must be kept up.

The question whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses.

In order that a share holder may be entitled to bring an action for recovery of dividends, it is a condition precedent that the dividend should be declared by the directors. Dividends should be paid out of profits.

JOTTINGS AND CUTTINGS.

The new Civil Rules of Practice:—

The new Civil Rules of Practice applicable to the Subordinate Courts of Justice in this Presidency and published in the *Fort St. George Gazette* of the 20th May 1902 will come into force on the 1st of September 1902. There is change in several important respects from the existing rules and courts and practitioners will have to pay special attention to the points of departure. The new rules are likely to entail a considerable amount of additional work upon practitioners in respect of compliance with numerous formal requisites. Pleaders will be bound to have a proper establishment for

the service of notices as provided by rule 6. This may be a hardship to practitioners in the courts of District Munsifs.* * *

Leave to bid.—Rule 153 of the new rules makes an important departure from the existing practice as regards the granting of leave to bid to the decree-holder. He will not have leave unless he gives an undertaking to give credit for the market value of any property he purchases in auction. This is obviously designed for the benefit of the judgment-debtor, but it seems to us even questionable whether in the event it will prove a blessing. We are strongly inclined to think that ninety-nine out of a hundred decree-holders will not apply for leave upon such terms, and the judgment-debtor who has generally the best bidder in the decree-holder will get a less price in his absence. We trust that at the end of the year the High Court will call for a return showing the result of the working of this rule and repeal it if, as we apprehend, it does not work beneficially. * * *

Sale of debt.—We think rule 159 is a very good rule in the absence of the garnishee procedure under the Code. No attached debt shall ordinarily be sold but the same shall be realised by a receiver. At present in many cases the sale of debts realises but a small proportion of the debt and entails heavy loss upon the creditor. This evil will be remedied under the new rule. If the debt is very small or it be not payable for a considerable time, the ordinary procedure of sale will be followed. We trust, however, that the garnishee procedure of the new Bill will soon become law and thereby relieve judgment-debtors from the hardship of the present procedure. * * *

Sale of decree.—Rule 194 directing that no decree should be ordered to be sold in execution of another decree lays down an important principle which has generally been recognised hitherto in practice. S. 273 of the Civil Procedure Code deals only with decrees for money being executed by the decree-holder who attaches such decrees. It provides in terms no rules for dealing with decrees under attachment other than decrees for money and a sale, therefore, of such decrees has often taken place. See I. L. R. 16 B. 522. Rule 184 prohibiting the sale of any decree under attachment is likely to introduce new problems. If the decree shall not be sold, supposing it is a decree for money, the land or any portion of it

may be attached by the paramount decree-holder and sold or how is the purchaser to get possession of the property? He must apply for execution of the decree for land. Will he be the representative of the decree-holder under section 244 or will he be representative in part as regards a portion of the land purchased? In one sense the problem is not new, for it might arise even under the present practice. For there is nothing to prohibit the sale of the land instead of the decree for land, but it will come more to the front as the sale of all decrees is prohibited.

* * *

Transfer from Presidency Magistrates.—An application to transfer a criminal case from the file of one Presidency Magistrate to that of another is not unknown in Madras. We have, however, always been of opinion that the High Court had no power to make it. S. 526, Criminal Procedure Code, authorizes a transfer from one court to another. But the court of the Presidency Magistrate is one, though there are four magistrates presiding over it. Distribution of business among the magistrates of the court is a matter of internal arrangement for the convenient disposal of business. The Presidency Magistrates may so arrange business so that one officer may deal with cases which it is inconvenient for another officer to deal with. But it is not for the High Court to make the transfer. We have known several cases of transfer being made without any objection being taken. But Mr. Justice *Bhashyam Iyengar* sitting as vacation judge pointed out the absence of jurisdiction and declined to make the transfer asked for.

* * *

The Impartible Estates Act has received the assent of the Viceroy, and it will be law for one year. Bad as many pieces of legislation are in India, this is worse than many of them; and the manner in which this is passed into law is also extraordinary. A meeting of the Council was convened, and the agenda says that the Bill will be introduced and referred to a select committee. But it is stated that it is passed into law at once. None of the members appeared to have bestowed any consideration on the language of the Bill. The Bill is badly drafted and important amendments hastily drafted on the spot are moved and the Bill becomes law. The emergency that called for this somewhat original plan of legislation, it is not easy to realize. We sincerely

trust that there will not be a repetition of this kind of legislative procedure.

In the first place, certain estates are declared impartible, which nobody could have ever supposed to have been impartible. Opinion may well be divided on this creation of new impartible estates by statute. Alienations by the holder for the time being are valid when they are within the limits of the powers of a Hindu manager, even though the estate be held by a Mahomedan or a Christian. Expenses of maintenance, of marriages and of funerals which may be met by a Hindu manager by alienation are apparently to be recognized as proper purposes even where a Christian or a Mahomedan holds it. We do not care to discuss this Act further as its life is short. But we hope more judgment and study will be bestowed upon the promised Bill which is to have a permanent place on the Statute Book.

* *

Torts—Libel—Statement libellous only in connection with facts unknown to defendant.

The defendant, a newspaper publisher, printed a notice stating that the plaintiff's wife had given birth to a child. The plaintiff had been married only a month, but of this fact the defendant was ignorant. The notice was untrue. *Held*, that the plaintiff had a cause of action. *Morrison v. Ritchie & Co.*, 39 Scot. L. Rep. 43; 112 L. T. 472.

Formerly a defendant was responsible only for publications libellous to his knowledge. *Dexter v. Spear*, 4 Mason (U. S. Circ. Ct.) 115; *Smith v. Ashley*, 11 Met. (Mass.) 367. But on grounds of sound public policy, the law now requires a defendant to know at his peril the usual construction and implication of his words. See *Hanson v. Globe Newspaper & Co.*, 159 Mass. 293, 299; Odgers, Lectures on Libel, 74. Liability, therefore, is now extended to the intentional or negligent publication of all matter libellous in itself. *Vizetelly v. Mudie's Select Library*, [1900] 2 Q.B. 170. But where, as in the principal case, the words themselves have no libellous sense, but are rendered defamatory only in connection with existing facts known to readers, this rule of policy is not involved. In this class of cases, if a defendant knows the additional facts, he should clearly be responsible on the ground of intentional defamation. See

Odgers, Libel and Slander, 3; 120. But if he is ignorant of the facts, it seems just that he should be liable only if his lack of knowledge was occasioned by negligence. See *Capital, etc., Bank v. Henty*, 7 App. Cas. 741, 771; cf. *Hanson v. Globe Newspaper Co.*, *supra*. Such a doctrine would be in accord with the usual principles of liability in tort. The decision in the principal case, which intimates that the defendant should be liable regardless of negligence, seems unnecessarily to extend the absolute liability for the defamatory effect of the words published, which is imposed by the rule of policy above mentioned.—*Harvard Law Review* (865).

* * *

Evidence—Hearsay—Report of Testimony given through Interpreter.—The defendant was on trial for perjury, the indictment alleging the falsity of testimony given by him through an interpreter at a former trial between other parties. A witness who had not understood the defendant was allowed to give in evidence, the defendant's statements as repeated by the interpreter. Held, that this evidence should not have been admitted. *State v. Terline* 51 Atl. Rep. 204 (R. I.). A witness who cannot speak the language of the *forum* may always be required to testify through an interpreter appointed by the court. See *Schearer v. Harber*, 36 Ind. 536. Since both the witness and the interpreter are under oath and subject to cross-examination, the hearsay rule is inapplicable. See Wharton, E.V., S. 174. The translation becomes the testimony of the witness in the original trial and may be treated as such in subsequent trials between the same parties. See *Schearer v. Harber*, *supra*. But where, as in the principal case, it becomes material to prove what the witness himself said, as distinguished from what testimony was given, a difficulty presents itself. In this situation it is hard to meet the objection of hearsay, unless the statements of the witness are testified to by the interpreter himself or by some other person who understood the witness. See *People v. Ah Tute*, 56 Cal. 119. Though a report of the testimony as given by the interpreter would be logically much more reliable evidence on the question at issue than most hearsay, such considerations do not affect the absoluteness of the hearsay rule. See Thayer, Prel. Treat. E.V., 521, 522.—*Harvard Law Review* (859).

* * *

Effect of statutes for survival of actions on liability for death by wrongful act.—Statutes providing that personal actions shall survive the death of the party injured are frequently found side by side with statutes which allow action for wrongfully causing death. The latter class of laws—death acts—are generally modelled upon Lord Campbell's Act, 9 and 10 Vict., c. 93, which provides for suit by the personal representative of the deceased for the benefit of his near relatives. Such provisions seem applicable to many cases also covered by the survival acts, and the decisions are squarely in conflict on the question of allowing recovery under both statutes for the same wrongful act. The solution of this question seems ultimately to depend on whether the death acts create an essentially new cause of action or merely apply to cases outside the scope of the survival acts and add death as a new element of damage. The cases which adopt the latter view hold that the Legislature never intended to allow two actions, and evade in various ways the apparent concurrence of the remedies. Such an evasion is made in Michigan, where, it has recently been held that the death acts apply only to cases where, owing to instantaneous death, no right of action ever vested in the deceased, and where, consequently, there could be no question of survival: *Dolson v. Lakeshore, etc., Ry. Co.*, 87 N. W. Rep. 629.; *Jones v. McMillan*, 88 N. W. Rep. 206. To place such a restriction on the death acts, however, seems inconsistent with their broad wording and is certainly contrary to the great weight of authority. See *Com. v. Mef. R.R. Co.*, 107, Mass. 236; *Tiffany, Death by Wrongful Act*, § 73. Other courts make the evasion by restricting the survival acts, and hold that they apply only where the death was due to causes other than the tort sued for. *Martin v. M. P. Ry. Co.*, 58 Kan. 475; *Holton v. Daly*, 106 TM. 131. This interpretation seems equally unwarranted by any provision of the statutes and is not generally followed. *Davis v. Ry.*, 53 Ark. 117; *Brown v. c. etc. N. W. Ry. Co.*, 77 N. W. Rep. 748 (Wis).

On the other hand, the view that the death acts give a new right, thus allowing a double remedy, is supported by the weight of authority and seems preferable. *Bowes v. City of Boston*, 155, Mass. 344; *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294. The courts which adopt it reason that, while the defendant's liability is

created by only a single act on his part, yet that act is in violation of two rights—the common law right of the deceased to personal immunity and the statutory right of his relatives to his life. The wrong in one action is the personal injury and the statute of limitations runs from the time of such injury. The damages are for the physical suffering and the financial loss of the deceased up to and ending with the time of death. *Muldowney v. T.M.Cent. Ry. Co.*, 36 Ta. 462. The sum recovered becomes part of the general estate and is subject to the claims of creditors. In suits for the death, however, the wrong is causing the death, and the period of limitation, which is expressly provided by the majority of such statutes, runs from the time of death. The damages are restricted to the pecuniary loss to relatives resulting from the death, which are, of course, subsequent to it in time. *Needham v. Grand Trunk Ry. Co*; *Kelley v. Cent. R. R. of I. a.*, 48 Fed. Rep. 663. Though the personal representative of the deceased may be the plaintiff in both suits, still that he is regarded as acting in different capacities is shown by a decision that facts established in one action are not *res adjudicata* for the purposes of the other. *Leggott v. Great Northern Ry.*, L. R. 1 Q. B. D. 599. The recovery in the action for death is solely for the benefit of relatives, and creditors of the deceased have no rights in the sum recovered. *Cf. Gores v. Graff*, 77 Wis. 174. If the double remedy is allowed, therefore, both the creditors and the relatives are compensated, whereas the contrary view must regard one or the other as having sustained *damnum absque injuria*,—a result certainly not in keeping with the purpose of this legislation. See 9 and 10. Vict., c. 93.

It is true that since the view advocated involves the doctrine that recovery by the administrator for the personal injury is no bar to an action for the death itself, it is not entirely consistent to hold that if the deceased had before his death recovered for this same personal injury, no subsequent proceeding for the death could be maintained. The latter position, however, is necessary, inasmuch as the usual death act requires that the deceased in such a case be entitled to maintain an action," at the time of death. *Read v. Grt. East Ry.*, L. R. 3 Q. B. 555. But this inconsistency does not seem to be an objection of decisive weight, as it is due merely to an inadequate wording of the statute. See 28. A.M. Law Rev., N. S., 385, 513, 577.—*Harvard Law Review*, (854).

Effect of the Absorption of a state upon its existing Treaties.— Much learning and ingenuity have been displayed by publicists on the interesting question of the assumption of the debts of a state or territory, when it is absorbed or ceases to hold a place in the family of nations; but the equally interesting question as to what becomes of its treaty obligations has received only passing attention.

So long as the status of the contracting parties remains the same, it would seem that a treaty once lawfully contracted by free and capable parties should continue to exist unless some period for its termination is fixed by the treaty itself, or unless there has been a breach by one party which has been acted upon by the other. When, however, one of the contracting parties changes its political status, the question of the continuance of the treaty relation is effected not only by the nature of the change in the status, but also by the nature of the treaty obligation. It would seem to be clear that when a state or territory loses all individuality as a sovereignty, and becomes incorporated into the territory of another, then the treaty obligations of the state so incorporated will end *ipso facto*. On the other hand, where a state joins others to itself for the purpose of forming a new single state, merely changing the name and size of the original, but substantially preserving its identity, then it would seem that the treaty obligations should continue in force. Furthermore, it would appear that when a state, retaining its separate Government and local law, becomes a part of a confederate state or federated union, all treaties made by that state should remain binding unless the nature of the treaty obligation is such that it could not reasonably be carried out by the state itself or by the newly formed state.

A few months ago, the Imperial German Council at Chicago sought the arrest and commitment, under Treaty of 1852 between the United States and the Kingdom of Prussia, of a fugitive from Prussia accused of uttering forged certificates. On application for the writ of *habeas corpus* the main contention of the prisoner was that the treaty was terminated by the formation of the German Empire in 1871. The Supreme Court of the United States affirmed the order of the District Court remanding the prisoner for extradition. *Telinden v. Arnes*, 22 Sup. Ct. Rep. 484. A short ground for supporting the case is this: the question whether an

executory treaty such as an extradition treaty is in force, is a political question, and on such a question the judicial department is bound by the decision of the executive department. *Foster v. Neilson*, 2 Let. (U. S. Sup. Ct.) 253, 314; *Mighell v. Sultan of Gohore*, [1894] 1 Q. B. 149. The Executive Department of the United States Government has recognised the treaty as being in force. *Treaties and Conventions*, 921 (1889); *Treaties In Force*, 520 (1899).

The case may also be supported on the principles set forth above. The Kingdom of Prussia has remained a distinct entity, and is capable under the constitution of the German Empire of carrying out its obligations; and even though technically the adoption of that constitution was a breach of the treaty, yet the United States never acted upon it. Furthermore, an extradition treaty is not the kind of treaty a state, after such a change in its political status, cannot reasonably be expected to carry out, for its execution involves purely ministerial acts, and its object, the mutual helpfulness of returning fugitives from justice, is as desirable after the change as before. Only one other case involving this question has arisen in this country, and in that case the decision was the same. *In re Herman v. Thomas*, 12 Blatchf. (U. S. Circ. Ct.) 370. A number of cases have come up in the Courts of France and Italy growing out of the union of the Italian states in 1860. Almost without exception the courts have held that the Treaty between France and Sardinia contracted in 1760 remains binding. *Inconomidis c. Coude*, 6 Clunet 69; *Paris*, Palais [1867]; 275; *Turin*, *Ginsisprudenza* [1865] 240; *Turin*, *Legge* [1876], 853. A few publicists have discussed the question, but they are not unanimous. See R. Le. Bousdelles, *Del' application dutrait'e du 24 Mars 1760 entre la France et la Sardaigne*, 9 Clunet 389, 390 *accord*; Pasquale Fiore, *Del' execution des actes et des jugments etrangers en Italie*, 5 Clunet 235, 244 *contra*.—*Harvard Law Review* (847).

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The Rights of Municipalities as affected by the Statute of Limitations.—The maxim "*Nullum tempus occurrit regi*" has been adopted from England into the law of the United States. Neither the Federal Government nor that of any sovereign state can be debarred by mere lapse of time from asserting its rights.

United States v. Hoar, 2 Mason (U. S. Circ. Ct.) 311. Under a representative Government a far seeing public policy demands that public rights shall not be lost through the negligence or misfeasance of public servants. The question often arises, however, as to whether a Municipality should be exempt from the operation of the statute. It seems that the proper answer must depend ultimately on how far a Municipality is part of the state machinery—a political and administrative division and how far a complete corporate entity with distinct rights and liabilities. The answer given to this query under varying circumstances will determine whether or not the statute may run against a city. To the proposition that public rights in and to highways, streets, and squares dedicated to public use cannot be lost by any length of adverse possession, there is general, but not universal, assent. See *Burbarek v. Fay*, 65 N.Y. 57, 69, 70. Even when the state, and *a fortiori* the city, is by legislation, subject to the statute of limitations, the courts have held that a city does not lose these rights by the lapse of the statutory period. *Hoadley v. San Francisco*, 50 Cal. 265. And where judicial legislation has not accomplished this result, the law-makers have themselves provided for it. See N. H. Pub. Sb. 1901; C. 77, § 7; Mo. Rev. St. 1889, § 6772; Verm. St. 1894, §§ 1220 and 1223. This trend of legislative and judicial opinion is well brought out by a recent Minnesota case. The court, acknowledging that the rule followed "was at variance with the overwhelming weight of authority and reason," felt reluctantly constrained by previous decisions to hold that the defendant by twenty years' adverse possession had acquired title to part of a public street. *City of Hastings v. Gillitt*, 88 N. W. Rep. 987. The Legislature has accomplished what the court felt unable to do; first, by enacting that statutory limitations shall apply to the state, and then providing that no occupant of any public street or highway shall acquire title by reason of such occupancy. See 2 Minn. St. § 5142; Minn. Laws, 1899, C. 65. But the statutes not being retroactive did not govern the principal case.

On the other hand, it is general law that title to land held by a Municipality for its private uses may be lost by the statutory period of adverse possession. *Enans v. Erie Co.*, 66 Pa. Sb. 222. But in several jurisdictions time always runs against a city, irrespective of circumstances. *Wheeling v. Campbell* 12 W. Va. 36.

It seems that the distinction noted above is not only reasonable, but in accord with other analogies. Unquestionably Municipal corporations, have dual characters, public and private, in accordance with which both their power to act and their liability for damage inflicted vary. It has been argued that the same reasons for applying the maxim of "*Nullum tempus*" to the sovereign do not hold in the case of a city. The city is more compact, it is said; encroachment on public rights cannot so readily escape detection, and there are officers to prevent just such acts. *Wheeling v. Campbell Supra*. But the other view seems more sound. The people are sovereign, and the city, after all, represents the people just as the state does; and it must be admitted that allowing adverse possession to give title would cause no less inconvenience in the case of a city street than in that of a state highway. One eminent author, in maintaining the position here set forth, has made one qualification. If a man has innocently occupied public land, and the city by its acts has led him to believe that the land is his, and its deprivation would entail great loss on him, then the city should be equitably estopped to set up its claim. Dill, Mun. Corp.; 4 Ed; § 675. See 15. Harv. L. Rev. 737. With this exception, therefore, it seems that the purely public rights of a Municipal Corporation should not be barred; but that those of a *quasi* private nature should be treated like the rights of private persons or corporations.—*Harvard Law Review* (846).

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The "Life of Lord Russell of Killowen," by H. Barry O'Brien, is an interesting work. We were always admirers of Lord Russell's talents, but more particularly of him as a barrister. It was there that he shone indeed, for he was a light standing out by himself. A by no means perfect man, but as an advocate about the best, and such an one as is only seen once in a way. He was in fact unique. As we read his life we feel here indeed was a man.

He was a man of wonderful activity, and the following is indeed a record to prove it, showing that where energy exists all sorts of things may be done, and that the busiest of men can even indulge in pleasure. "Russell always wished to be doing something. The week in question was that of one of the Newmarket Spring Meetings. On the Tuesday night he travelled, after having been in Court all day, down to Newmarket; Wednesday he

spent at Newmarket, and immediately after the races were over started for Stowmarket where he was advertised to speak at a political meeting at 8. After the meeting he returned from Stowmarket to London, arriving at 4 o'clock on Thursday morning. All Thursday he was in Court, and in the afternoon again went to Newmarket, returning to London on Friday night. On Saturday morning he was again in Court, and Saturday afternoon, after the Courts had risen, was devoted to some difficult cases for opinion. While he was going through these a telegram was brought into the room; he passed it on to me, and I saw that the purport of it was that the funeral of some friend of his was to take place in Dublin on the next day. He said, 'I think I will go,' and thereupon sent to order a sleeping berth at Euston. He attended his friend's funeral in Dublin on the Sunday, arriving in London again early on Monday morning. All Monday he was again in Court, and on the rising of the Court started for Ely to attend a meeting in the evening at which he had promised to speak."

One great secret of Charles Russell's success was, undoubtedly, not merely a wonderful capability of quickly grasping the facts of a case, but also of getting all machine work done for him—in other words, he utilized to the fullest the art of "devilling." Observe this example of a case—"He had not read his brief, and had no note. He knew nothing about the business. The solicitor and the parties were in his room waiting for him. I ran across to the Court just to tell him something of the case on his way back. 'Well, my boy,' said he, 'what is it all about?' I told him shortly, 'An action against an insurance company on a life policy. We are for the company. The defence is that it was a bad life, and that some important facts were not disclosed.' 'What's the point?' 'Well the point against us is that our doctor passed the life.' By this time we had reached his door. He did not hesitate a moment; he walked straight in without further question, sat on his chair, took off his wig, and looking the master of the whole situation said: 'Well, gentlemen, isn't this an awkward business about our doctor? Let me see his opinion.' Russell read the doctor's opinion, cross-examined every one, and soon got a grip of the case. But no one could have guessed that he had practically only heard of it about 10 minutes before he entered the room."

That Charles Russell was an irritable and sometimes a most trying individual no one can doubt who knew him professionally. He could be, and often was, brusque and rude. The following is a good tale about him and a cabman, and we feel that had he been the cabman he would have spoken much in the same way. In Manchester once Russell called a cab. The cabman was a powerful man in build. Russell scanned him, "Why," he said, "a big fellow like you ought not to be driving a cab." "What the hell is it to you what I do," said the cabman. "You get into the cab and mind your own business."—*The Law Students' Journal* (93).

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After hearing the evidence in an assault case between man and wife, in which the wife had had a deal of provocation, the Magistrate, turning to the husband, remarked, "My good man, I really cannot do anything in this case." "But she has cut a piece of my ear off sir." "Well," said the Magistrate, "I will bind her over to keep the peace." "You can't," shouted the husband, "she's thrown it away."—*The Law Students' Journal* (95).

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How one young Lawyer built up a Practice.—Three young professional men were dining together at the club. The two who had not inherited money were successful in their professions. The other didn't have to be. With the first two it had been a struggle in the beginning, which made the present all the more satisfactory to them. One had made his name known and recognised as an authority as a writer on subjects of his profession in every state in the Union, the islands of the sea, in Asia and in Africa, where his books had been sold. The other had won a reputation as an energetic, able and successful practitioner in the field of commercial law, and that reputation had been spread to the business centres of the country where there were merchants and other lawyers who might have matters in his locality that should be attended to by such a man as he.

. They fell to talking of their early days, for the two who had made their own way were graduates of the same university, where they had both paid their own expenses, and the young lawyer told how he got his start and had followed it up.

After he got his beautifully engraved diploma written in a language that his clients couldn't have read if he had had any, but which in the exuberance of youth, not to say its extravagance, he had put into an elaborate frame, he didn't have enough money to rent a whole office, so he took desk room in some other man's office, where he could be irritated by seeing the other man's clients come in regularly and wasn't disturbed by any of his own.

Things ran on for about three months, by which time he was in arrears with the rent for his desk room, not to speak of his board. One Sunday he was walking home from church with his mother, when she asked him how business was coming on, and he had to tell her it wasn't coming at all. "Well, if I was a man," said the wise mother, "I wouldn't sit still in my office all day doing nothing and having nothing to show for my time. I'd get out and get business." "But," said the ambitious son of Blackstone, "I can't do that. Professional ethics don't permit a lawyer to seek business." "Professional ethics, fiddlesticks! Of course you must be gentlemanly about it, but anything that is honest and honourable is legitimate—or it should be—and what is worth having is worth going after. People miss lots of things in this world just because they don't ask for them. You have spent your time and your money getting an education to fit you to practise law, and you are practising law, or trying to for the purpose of making a living. Has this all got to be wasted when people don't know about you and bring you their cases, just because some old lawyers a hundred years ago who probably had plenty of money and didn't need clients any way, said a lawyer shouldn't seek clients. Conditions are different now anyway, but even if they weren't I wouldn't give much for a profession that says a man can't take cases unless they are handed to him on a silver platter, which they won't be, though he could get lots of them by politely soliciting them. It may be more pleasing to one's pride to be able to sit still and have clients come to him when (or if) they get ready, but you'll observe that mighty few of these successful lawyers who are now talking so glibly about the grand profession and its ethics did that, and what's more, you can't. Whatever is honourable and gentlemanly is professional enough for me, and if I was a man and business didn't turn up, I'd turn it up."

"Well that conversation was a pretty hard rap for me with my engraved diploma in its beautiful frame hanging over my desk, but I couldn't help realizing there were lots of common sense and truth in my mother's remarks, particularly the statement that I couldn't afford to wait for clients to come to me. There were loads of truth, but no poetry in that statement," said lawyer Blank. "I pondered over the problem till the next day, and then, bright and early I ordered some cards reading 'The Detroit Collection Agency, John Blank, Attorney,' for I didn't want to personally solicit business in my own name and I knew it was little use to send the cards by mail—besides I didn't have the stamps. Then, too, I knew I couldn't solicit simply good cases, so I had decided to 'despise not the day of small things,' but to take whatever I could get, even if it was the meanest business they had, and work from that as a starter into the good business they must have from time to time.

"As soon as the first cards were delivered, I dressed up as well as I could, so as to make a good appearance, for first impressions count, went to the beginning of the principal business street and called at every store and saw the manager, credit-man, book-keeper or whoever had charge of the collections, told him I had started this agency and asked him to give me a trial with some claims. I got some accounts then and there if possible, and I always left one of my cards. If I got any encouragement, but got no claims within a few days, I went back and reminded them of the matter, and sometimes I went back even if I hadn't gotten any encouragement. I worked that street in this way to the end, not missing a single business house, and then I started on another, and followed this plan until I had called on and introduced myself to every business house of any importance in town, and the work of collecting the accounts took me into nearly all of the others in the course of time.

"When I was given any accounts, an agreement as to fees was entered into, my fees, on current accounts, which are easiest to collect, being 10 per cent.; on accounts one year old, 25 per cent.; if two years old or more 50 per cent.

"By the end of the first week I had accumulated quite a batch of accounts for collection, and they of course demanded a good deal of my time, so that I couldn't call on so many possible new

clients, for it was a part of my plan to push every claim given me as hard as I could, regardless of the amount of time and labor it took, and also regardless of the amount of the fee to be earned in that case. In this part of the business I used my bicycle and it saved me lots of time and car fare. Every time I saw a debtor or learned anything about one I made a report to the client at once. Of course the client is always entitled to these reports and expects them, but a good many lawyers and collection men omit to make them, which is very poor business on their part. I worked this feature particularly hard, though, using each report as an opportunity for further cultivating and getting personally acquainted with the client. The client appreciated the reports, as well as the hard, faithful work on his claims that they evidenced, and the intimate acquaintance thus cultivated continually brought me new and better business from present clients as well as from others to whom they spoke of me.

“ When I got hold of a debtor I hung on to him like grim death, and did everything possible to harass him into paying, if I couldn't induce him to do it pleasantly. If he gave me a promise of payment at a certain time, I was there at the minute waiting for the money, and made him understand that I intended to get it. If it was plain that the man couldn't pay all at once, I made an arrangement for instalments, or if the claim was old, I would get him to give me a short time note with an indorser if possible, without one if I had to. If there was no indorser the time was particularly short. I worked a claim for \$ 100 as hard as one for \$ 500, though my recollection is that I wasn't trusted with many \$ 500 ones at the start. I wasn't too proud to do anything that was all right, and I had come to the conclusion that the only thing a man has a right to be proud about is work successfully accomplished. It is results that count.

“ By the end of the first month I had got a good deal of business, and by hounding the debtors till they were sick of the sight of me and paid me to get rid of me, I had collected a number of the claims, some of the very worst and oldest at that, so that I got some very good fees. Of course, I hadn't made a great deal of money, very little, in fact, as compared with the amount of work I had done, but I had at least made a start and had done a

great deal better than in all the other months since my admission to the bar put together. Besides, I had now some claims on which I thought suit should be brought, and I had made such a good record by the way I had so far handled and worked their business that the clients were willing to accept my judgment in the matter and authorized me to bring suits. Then my troubles began in earnest. I knew enough about pleading to know what form of action to select to fit the facts of each case, but when I went to the justice court to start the case, I found I didn't know how to do it. I put on a bold front and tried to bull my way through, but it was too much of a "bull," so the clerk finally took me in hand and showed me what papers to make out and how. You may be sure I never forgot those lessons nor that clerk.

"When I brought a suit, I gave the preparation for trial my very best thought and attention, collecting and arranging the facts and evidence in support thereof, studying up every point of law that I could conceive in any way applied to that case, so that when I went into court there wasn't a point in the case, either in the facts or the law, that I didn't feel I knew and understood from the ground up. I'll bet there have been few such thoroughly prepared cases as my early ones, especially, tried in the Justice Courts here. It certainly was a surprise to the older lawyers who hadn't been in the habit of preparing their justice court cases so thoroughly, and as I tried every case as hard and thoroughly as I had prepared it, of course I won out.

"The results of these cases were pleasing not only to me but to my clients who had long since given up all hope of getting anything from those debtors, and the consequence was that circuit court cases followed. I remember the first case I had in the circuit court was a mighty mean one. The defendants, although business men of high standing, had really been trying to work a mean piece of business on my client. I prepared the case as thoroughly as possible in every respect, and in the trial fought every point as if it were the only one in the case till I had established it and moved forward to the next one. In my examination and cross-examination I was absolutely merciless to them, even bringing out a lot of matter that while not absolutely essential was not without weight and bearing on the case, for I was determined to overlook nothing.

I wonder now how I, but little more than a boy, had the nerve to treat those men of recognised standing in the community that way, but I was fighting to establish a reputation for myself as well as to establish the rights of my client, and I thought all the ends certainly justified the means employed. Anyway we got judgment for the full amount we claimed. The two defendants were so mad at me that, though I had had a speaking acquaintance with one of them for some time, neither of them would speak to me afterwards when he met me. The effect of the way I tried that case wasn't lost, however, even on the defendants, for a year or two after that, one of them had a case that had to be fought up to the last notch and he brought it to me, and I got a fee of \$ 1,000 out of it, my first real big fee. The way I handled collections also brought me business from people whom I met first by having claims against them.

Of course I had my share of reverses, but when I lost a case or failed to make a collection, I took good care that it wasn't my fault.

About this time I concluded I would put in a bid for some of the out-of-town business that was coming in to a few Detroit lawyers who were seeking it, so I began advertising in the legal directories and magazines that reached the people throughout the country most likely to have that kind of business. Of course, the collection business itself isn't the most pleasant kind of business that a lawyer gets and not every lawyer is business-like enough to make a success of it though an unbusiness-like lawyer now-a-days isn't likely to make a success of any kind of practice, and I had heard that the leading firm of commercial lawyers in town was dividing about £ 30,000 a year, so it seemed to me to be worth while, especially as there is nothing equal to collection business as a breeder of good commercial practice. Then I joined the Commercial Law League of America, the national association of commercial lawyers and collection managers, I attended their annual conventions, thus making the personal acquaintance of some of the men I had been advertising to. Collections from outside began to come to me which I gave the same attention that I had always given local business, for while advertising will bring clients once, nothing but good conscientious work will keep them. Both the quality and the amount of my business was continually increased in this way, so

that, by the end of the third year I was making about £ 3,000 a year. Of course it took hard work, and lots of it and didn't leave much time for society, but if you will remember me when I was in college and look at my condition now, you'll have to admit that it hasn't done me any harm. There is plenty of business to be gotten if you go after it right, but it takes push and work to get it as well as to take care of it, and there is no use going after it unless you'll take care of it properly, for a neglected client isn't likely to call again. While the bar is quite sufficiently crowded, there is no lawyer here who really deserves to have business, I think, who hasn't got it, though there are some who know plenty of law who have no clients. But a mere knowledge of the law isn't enough for successful practice now-a-days. The interests involved are principally commercial, so the practice of law has become commercialized and the lawyer to be successful, must also be a good business man."

This story the writer knows to be true, though for obvious reasons the name of its hero is not disclosed.—*The Law Students' Helper* (103).

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Injunctions against picketing.—The ill-feeling and prejudice engendered by strikes make the subject one requiring peculiar delicacy of treatment and one, moreover, of great popular interest. The system commonly known as "picketing" almost always accompanies a strike. Its purpose generally is not only to gain information but to prevent others from entering the employ of the company or person against whom the strike is directed. Whether it is tortious always or only when it assumes particular aspects, has been the subject of considerable difference of opinion. It is apparently conceded that the use of threats or violence will be enjoined. *Murdock, Kerr and Co. v. Walker*, 152. Pa. St. 595. Some authorities refuse to go beyond this. *Krebs v. Rosenstien*, 66, N. Y. Supp. 42. Others extend the injunction to picketing in general. *Vegelahn v. Guntner*, 167, Mass. 92. In a recent case in Ohio an injunction was granted against all picketing. *Dayton, etc. Co. v. Metal Polishers, etc. Union*, 11 Dec. (Ohio) 643.

• Perhaps the most satisfactory way to treat a subject of this sort is to adopt the view of Mr. Chief Justice Holmes, that the intentional infliction of damage is *prima facie* actionable. 8 Harvard L. Rev. 1. This would of course include intentional interference

with another's business. Obviously, such interference is actionable if it is accomplished by a direct tort against his person or property. The general rule is that it is also actionable if accomplished by inducing a third person to break a contract with him. *Lumley v. Gye*, 2 *E. and B.* 216, *Jones v. Stanly*, 76 *N. C.* 355. Although no actual tortious methods are used, interference is still actionable *prima facie*. In other words, it is actionable unless there is some justification. The ordinary pursuit of business or competition in trade furnishes a justification, much as the right of a man to use his real estate as he pleases furnishes a justification for the intentional infliction of damage by such means as 'spite fences.' *Letts v. Kessler*, 54 *Oh. St.* 73. See *Mogul S. S. Co. v. McGregor Gow and Co.*, 23 *Q. B. D.* 598; *L. R.* [1892] *A. C.* 25. It would seem that ordinarily the competition between employer and employée, and among employées themselves, which is just as real as that between business interests, should furnish a justification. *Holmes, J.*, dissenting, in *Vegelahn v. Guntner*, 167 *Mass.* 92, 104. Of course these justifications, while they excuse the infliction of some kinds of intentional damage, cannot excuse all. For example, they would not excuse direct torts against the person or property of the rival, nor preventing others from dealing with him by the use of violence or other means tortious as against them. See *Tarleton v. M'Gawley*, *Peake* 270.

To apply these principles to the subject in hand, it would seem theoretically, perfectly peaceful picketing would be justifiable. Such picketing is conceivable; but as a practical matter picketing generally is not, and from the nature of the circumstances cannot be, perfectly peaceful. The very presence of a picket usually contains a threat of violence. It is *per se* a tortious act as regards the prospective employées—an assault often accompanied by a battery. Therefore it should be actionable when there has been any damage to the prospective employer.

The ground of equity jurisdiction is clear. Irreparable damage is threatened, and there is a continuing injury, so that resort to the legal remedy would result in a multiplicity of suits. *Barr v. Essex Trades Council*, 53 *N. J. Eq.* 101, 126. It would be inadvisable to divide up the injunction so as to prohibit tortious actions and permit peaceful picketing on account of the difficulty which has

been suggested of separating one from the other. Since, however, the granting of the injunction is largely in the discretion of the court, there would seem to be no reason why the court should not first look at the circumstances, and the general progress of the strike. If the strikers in all their dealings have been so fair and conciliatory that it is apparent that a picket established by them would be peaceful and friendly, though such a state of affairs may be rare, then the injunction might well be refused altogether. Otherwise the injunction should be granted.— *Harvard Law Review* (p. 482).

We beg to acknowledge receipt of the following publications:—

Calcutta Weekly Notes	for	...	...	June and July.
Columbia Law Review	"	...	...	June.
Green Bag	"	...	...	do
Kayastha Samashar	"	...	..	June and July.
Canadian Law Times	"	...	...	do.
Indian Review	"	...	...	do.
The Bombay Law Reporter	"	...	...	do.
The Law Students' Helper	"	...	...	June.
The Lawyer	"	...	..	do.
Punjab Law Reporter	"	...	...	June and July.
The Australian Law Times	"	...	.	June.
Canada Law Journal	"	...	'...	do.
The Law Students' Journal	"	...	...	June and July.
The Kathiawar Law Reports	"	...	...	do.
The Digest	"	...	...	do.
Harvard Law Review	"	...	...	June.
Law Notes	"	...	..	do.
American Lawyer	"	...	...	do.
American Law Review	"	..	...	do.
Edinburgh Review	"	...	...	June and July.

The Madras Law Journal.

PART VIII.]

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[VOL. XII.

* THE CIVIL PROCEDURE CODE BILL—(*Continued*).

WE shall now proceed to consider the provisions in regard to the sale and delivery of property generally. Under section 294, if a mortgagee decree-holder obtains permission to bid at the sale of the property, he is to be deemed to bid the whole value of his claim under the decree. The reason for imposing this restriction is alleged to be the reluctance of the public to bid against a mortgagee decree-holder and the consequent inadequacy of price realised at the sale. It is assumed that properties are always mortgaged for sums considerably below their real value, and that there would, therefore, be no hardship in compelling the mortgagee to pay not less than the whole value of his claim, if he purchases at all. The assumption made is not always well-founded. Very often, a mortgagee does not look wholly to the security for payment, but looks also to the personal credit of the debtor. Where the personal credit of the debtor is high, the mortgagee may be content to accept a smaller extent of property as security than he would otherwise do. This is one reason why a mortgagee generally stipulates for the personal liability of the mortgagor also and obtains a decree enforcing such personal liability for the deficiency arising upon the sale of the mortgaged property. Even where the property mortgaged is originally sufficient to satisfy the debt, it may afterwards become insufficient for the discharge of the mortgaged debt, either by reason, as is very often the case, of the accumulated interest adding to the debt, or, of a deterioration in the value of the property. To compel the mortgagee to bid for the whole value of his claim would, therefore, be a grave injustice to the mortgagee, and be tantamount to a cancellation of the personal remedy granted by the decree. Notwithstanding the fact that he may have a right to enforce his claim against the mortgagor personally

and that he may have obtained a decree granting the personal remedy, this portion of the decree will, *ipso facto*, be expunged by his purchase of the mortgaged property. There is no reason why this result should follow when the property is sold to the mortgagee, while it does not follow in the case of a purchase by a stranger. A mortgagee generally obtains leave to bid, when he finds that bidders are not forthcoming to purchase the property for a fair price. Very often, it is due to the machinations of the debtor who dissuades intending bidders for the purpose of purchasing the property in the name of a relative or a friend for a low price and thus defrauding the mortgagee. It is a great mistake to suppose that decree-holders alone are guilty of fraud and that judgment-debtors are always honest and make no attempts to cheat their creditors. In our experience, fraudulent contrivances on the part of debtors are much more common than on the part of decree-holders to purchase the property of the debtor for a low price. Though leave to bid might not be granted to a decree-holder, unless the court is satisfied that the property will not otherwise fetch a fair price, the court should not, in granting leave, impose any restrictions on the decree-holder. The mortgagee cannot become the purchaser unless he is the highest bidder, and there is no reason why the mortgagor should be allowed to take advantage of the accident of the mortgagee purchasing, to claim more than the amount of the highest bid at the auction. The mortgagor would be in no better position if the mortgagee had not been allowed to bid. Having regard to the fact that sales in execution are in this country conducted by the court, the correct principle to follow is the one laid down by the Privy Council in *Mahomed Meera v. Ragunada*, I. L. R. 23M. 227, that, when leave to bid is granted, the decree-holder should be treated on the same footing as any other bidder. If the section provided that the mortgagee should be deemed to bid either the whole value of his claim or the estimated value of the lot, whichever was lower, there might be some sense in the provision. But as the draft section stands, even though the amount of the mortgage debt may exceed the value of the property, the mortgagee has to enter up satisfaction of the whole claim. The absurdity and injustice of the section will be specially apparent when the mortgaged property is sold in several lots. The effect of the draft section will

be that even though the mortgagee purchases one only of the several lots into which the property is divided for convenience, the mortgagee should bid the whole value of his claim.

Proceeding to section 295, we notice some very useful amendments—the chief among them being that every application under this section of which the judgment-debtor has notice, should operate as an attachment, notwithstanding that the original attachment may, for any reason, have ceased. Very often, the decree-holders who may apply for rateable distribution do not take steps to attach the property of the judgment-debtor in the belief that they can share in the rateable distribution. But the judgment-debtor may satisfy the decree-holder who brings the property to sale and terminate the proceedings. And if he alienated his property before the other decree-holders should effect an attachment, they would be defrauded, while the decree-holder who attempted to bring the property to sale would have been fully paid.

In the case of a sale of moveable property in which the judgment-debtor is entitled as co-owner to a share, section 297 lays down that, if the co-owner fails to purchase the property, he shall not be entitled to assert any claim to it, but can only participate in the sale proceeds to the extent of his share. This provision is likely to work mischievously in the case of joint Hindu families. A judgment-debtor who is a member of a joint Hindu family may have largely overdrawn his share, and if some specific moveable property of large value is attached, it may be found that the share to which the judgment-debtor is entitled upon a partition and adjustment of accounts, is very small and much less than the value of his share in the moveable property as determined by the mere number of co-sharers. Where the co-ownership relates only to a single thing, there is no harm in compelling the co-sharer either to purchase the thing, or allow it to be sold. But this rule is inappropriate where the co-ownership extends to a number of things and there are accounts and equities to be adjusted between the co-owners. The same principle that underlies the amendment of section 295 we have noticed has led to a provision in section 310A, that a person applying to set aside a sale under section 310 A must deposit the amount due to other decree-holders also who might have qualified themselves for rateable distribution under section 295. In section 311, a clause

has been added declaring that the mere fact that a material irregularity has been committed and that an inadequate price has been obtained for the property shall not entitle the court to presume that the price was inadequate by reason of the irregularity. It is also provided that the causal connection between the irregularity and the damage should be established by direct evidence. These provisions are due to a misapprehension of the observations in some decided cases and are as unscientific as they are harmful. The mere co-existence of irregularity and damage may not be sufficient to establish a causal connection between the two. But the circumstances may be such as to compel the court to infer that the irregularity was the cause of the damage. It is absurd to require that the connection between the two facts should not be established by indirect or circumstantial evidence and the section will only have the effect of encouraging false evidence. An addition has been made to section 335 on the same lines as the addition to section 283 to the effect that a person who complains of resistance, obstruction or dispossession, must proceed under sections 328 to 335, and that, if he does not proceed under sections 328 to 335, he should not be allowed, at any subsequent time, to assert the fact of such resistance, obstruction or dispossession. This provision is open to nearly the same objection as the amendment of section 283.

The chapter on Insolvency Proceedings has been completely recast and the provisions of the English Bankruptcy Act of 1883 have been largely borrowed. While it must be admitted that the law in regard to Insolvency under the existing Code is very defective, it must be pointed out that, at any rate, so far as this Presidency is concerned, the necessity has not been felt for any change in the law. Applications for insolvency are very rare in the Mofussil and the adjudication as an insolvent is generally regarded as a disgrace. In the Presidency town, on the other hand, where the statute of 11 and 12 Vict. has been in force, applications for insolvency are numerous and an adjudication of insolvency carries with it much less odium and humiliation than in the Mofussil. It appears to us very questionable to introduce any measure which will remove the weight of the stigma which attaches to an insolvent. The provisions in the chapter on Insolvency in the draft Code are distinctly calculated to facilitate and encourage applications to be declared as insolvents. The exigencies of an active trading community may, perhaps

require a complete scheme of legislation for the relief of insolvent debtors. But there is no such need in the Mofussil of this Presidency for a complete system of Insolvency Law. It must not also be forgotten that the satisfactory administration of the Bankruptcy Law requires a suitable machinery which is wanting in the Mofussil. Where a debtor is adjudged as an insolvent, the court is not bound to appoint a receiver of his property, but has discretion to appoint or not to appoint. We do not think it possible for the court itself to undertake the duties of a receiver, and we think it absolutely necessary to the proper administration of the Bankruptcy Law that there should be an Official Assignee in each district in whom the properties of all insolvents should be vested. While the framer of the Bill thinks that the system of giving notice by publication in the gazette is absolutely essential to the success of any scheme of Insolvency Law, we are of opinion that the publication of notice in the Gazette should not be resorted to except in the last resort as a means of giving notice to creditors whose addresses could not be found by the debtor or who avoid service of notice. To dispense with the necessity of actual notice to individual creditors would lead to fraud and cause hardship to creditors who might not be aware of the application for insolvency. It is a mere fiction to suppose that the people of this country read the Gazette and must be aware of the contents of the notices published in the Gazette. It may, on the other hand, be safely taken for granted that nobody reads the Gazette. The court should, therefore, direct the service of notices on individual creditors in all practicable cases and should direct the publication in the Gazette only as a means of reaching creditors who cannot be otherwise reached. The provisions of section 359 in regard to interest are also very drastic and unjust to creditors. Section 359, clause 2, lays down that when a debt includes interest, the interest should be calculated for the purposes of dividend at a rate not exceeding 5 per cent per annum. Whether such a provision may or may not be fair in regard to interest after the date of the vesting order, we think it grossly unjust to creditors to go behind their contracts and calculate the interest at 5 per cent. even prior to the date of the vesting order. If there are two creditors of an insolvent, one of whom has contracted for an interest of 12 per cent. and the other 6 per cent. and if, each of them, as is natural, has been in expectation of receiving interest at the

contract rate, we fail to see the justice of compelling them both to submit to a reduction of the interest to 5 per cent. The expectations of each creditor are built upon his own contract and the disappointment of these expectations is an injustice which is not compensated by the fact that other creditors who might not have entered into similar contracts are also obliged to take the same rate of interest. The correct principle, in our opinion, would be to treat the vesting-order as a decree in favour of the several creditors for the aggregate amounts of principal and interest at the contract rate, and adopt these aggregate amounts of the debts as the basis of the distribution awarding interest after the date of the vesting-order at the rate of 5 per cent. or 6 per cent. The provision in section 360B, clause 4, that where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property is senseless. If the clause provided that the surplus of the separate property of an insolvent partner, after the payment of his separate debts, should be available for distribution among the creditors of the partnership, it would be intelligible. But there is no reason for enacting that if a member of a firm becomes an insolvent, the surplus of his separate property should go to swell the capital of the partnership and to the benefit of the partners generally.

Coming to the chapter on suits by or against paupers we are glad to notice that provision is made for leave being given to a party to defend or continue his suit as pauper. With regard to the grounds of rejection of the application, section 407, clause B, sub-clause 3, provides that if the allegations of the applicant, if un rebutted, would not be sufficient to establish a right to institute, defend or continue a suit in such Court the application should be rejected. This is not much of an improvement upon the language of the existing section. The words "in such Court" should be removed from this clause as it is unnecessary to make a provision of this kind in this chapter to meet cases in which the Court would have no jurisdiction to entertain the suit.

Passing to the chapter on suits by and against minors, we find a number of additions to section 462 dealing with compromises. Clause 5 of this section is very unhappily worded. We take the object of this clause to be that if the validity of a compromise decree is to be impeached at all by a minor, it should be either by a

regular suit or by an application for review and not by way of objection to an execution proceeding. But as the draft section stands, it means that any and every decree passed in pursuance of a compromise may be set aside, if the minor prefers a regular suit or an application for review for that purpose and that the minor is not required to prove the existence of any ground for impeaching the compromise. This is, of course, absurd as it could hardly have been intended that a compromise decree should be set aside at the mere will and pleasure of the minor. Nor can we understand the necessity of conferring any such right upon a minor when a decree has been passed by the Court in pursuance of a compromise duly sanctioned by it. A minor should not be allowed to impeach a compromise decree duly sanctioned by the Court unless he is able to prove fraud or gross negligence on the part of his next friend or guardian. Nor, again, can we understand why such a decree should not be set aside on appeal, but only by a regular suit or by an application for review. Clauses 4 and 5 are both drafted in a very confused manner and should be entirely recast.

Chapter 32A (on suits by and against firms) is a very beneficial addition to the Code and we hope it will be extended to all the Mofussil Courts also. In the case of many firms and especially of Nattukottai chetties, it is hardly possible for outsiders to learn the names of the different partners and provisions like those contained in this Chapter are a great desideratum.

HINDU AND MAHOMEDAN RELIGIOUS ENDOWMENTS:—

DIFFERENT KINDS OF DEDICATION.

We shall next consider the different kinds of dedication.

Where the dedication is complete and the trust is perfect different considerations will arise, and the nature of the trust constituted will be different according to the nature of the dedication.

It has been already observed in a former article that the idol in Hindu Law is an ideal subject or person capable of owning pro-

perty; though at the same time it has been said that it is only in an ideal sense that property can belong to an idol and that the possession and management of it must in the nature of things be entrusted to some person as shebait or manager.¹ The dictum of *Straight, J.* in *Raghubar Dial v. Kesho Ramanuj Das*,² that "an idol cannot itself hold lands" is explicable in this sense, viz., not that the idol cannot hold lands legally but that physically it cannot hold and manage lands. It is therefore the practice in such cases "to vest the lands in a trustee for the religious purpose or to impose upon the holders of the lands a trust to defray the expenses of worship; sometimes the donor himself is the trustee." (Per *Straight, J.* in *Raghubar Dial v. Kesho Ramanuj Das*.²) It may however be observed that a dedication in favor of a religious establishment is not invalid even though no trustee is appointed; for, under the Hindu Law, "no express words of gift to such an idol in the shape of a trust or otherwise are required to create a valid dedication³".

The practice being to vest the lands in a trustee the question arises whether property is given for the religious purpose or is given to the trustee for the latter to enjoy at his pleasure. This greatly depends upon the intention of the parties and the construction of the document, if any, under which the property is claimed as an endowment⁴.

It may be observed that in the English Law a gift placed on the altar of God suffices to convey the lands or other property so placed, to the church. Similarly where offerings are made by a devotee to a Hindu idol, the gift is to the idol and the Shevaks or other trustees of the idol have no title or interest in the same. Indeed it cannot be contended that the idol has got a potentiality or separate existence for the purpose of bringing in offerings and vouchsafing blessings, but when once the gifts and offerings are made it is a mere block having no potentiality and subject to the ownership of the trustee or the Archaka. As Mr. Justice

1. (*Vide XII, M. L. J.*, pp. 62 and 63 ante and the cases therein cited.

2. (1888) I. L. R., 11 A. 18; See also Mayne, para. 437, 5th edition.

3. *Bhuggobutty Prosonno Sen v. Goo-*

roo Prosonno Sen, (1897) I L. R., 25 C. 112. *Vide also Manohar Ganesli v. Lakshmaram*, (1887) I L. R., 12 B. 247 at p. 263.

4. *Ranjit Singh v. Jagannath Pro-*
sad Gupta, (1885) I. L. R., 12 C. 375.

West^{*} observed in the famous *Ranchod Temple case*¹: "It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Sri Ranchod as a deity for inviting gifts and vouchsafing blessings, but as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land." It was, therefore, held in that case that the *Shevaks* were not the owners of the offerings and were responsible for their due application for the purposes of the foundation².

The above, however, is true, of an idol which is an ancient one permanently established for public worship and the offerings are more or less of a generally permanent character. There are, however, 3 cases in which this general rule will not be applied. These are.

- 1st, where the idol is set up temporarily for worship ;
- 2nd, where the offerings are of a perishable nature or are of a temporary character ;
- 3rd, where an usage is proved that such offerings whether permanent or otherwise should go to the shevaks or archakas or trustees.

The first case presupposes a case of no regular endowment. The idol is the private property of the person owning the same. If, however, it is a family idol which has endowments of its own, though it is not a public institution and not set apart for public worship and only persons who are members of the family or its shebaita are entitled to worship and have the right to exclude the public from worship, and if such persons permit outsiders to worship the idol temporarily or otherwise, any offerings made by such outsiders will not necessarily go to the members of the family or the shebaita in their personal character.

Thus in *Girijanund Datta Jha v. Sailajanund Datta Jha*,³ the Calcutta High Court observed : "Where an idol is set up temporarily for worship or where the offerings are of a perish-

1. *Manohar Gynesh Tambelar v. Lakhmiram Govindram* (1887) I. L. R., 12 B. 247 at pp. 264 and 265. 2. Vide also *Thackersey Dewraj v. Hurbhum Nursey* (1884) I. L. R., 8 B. 432. 3. (1896) I. L. R., 23 C. 645.

able nature, such as articles of food, the priest in attendance as the nearest Brahmin available generally appropriates the offerings, and the same is the case where the idol itself is the private property of a priest, but where the idol is an ancient one permanently established for public worship, and the offerings are more or less generally of a permanent character, being coins or other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are, as they ought to be, taken to be intended to contribute to the maintenance of the shrine with all its rights, ceremonies and charities, and not to become the personal property of the priests."

In *Rajah Vurmah Valia v. Ravi Vurmah*,¹ the pagoda was not a pagoda in the ordinary sense of the word but a mere platform in the middle of the forest upon which, once in every year, certain ceremonies take place in honour of a particular idol, and it was apparently assumed that the considerable presents and offerings made by the worshippers belonged to the idol. In this case the idol apparently had been permanently established.

In *Goosaeen Rree Choundawalee Bahoojee v. Girdhareejee*² where the suit was for the establishment of the plaintiff's right to the office of Gaddinashin of the temples at Nathdwara and Gokul and for possession of the temples and their endowments, the Agra High Court in holding that such properties were not the private properties of the trustee but were public religious endowments, observed: "Such properties and the funds arising from the offerings of the devotees, not being devoted to the mere private uses of the recipient, are regarded substantially as partaking of a trust or religious endowment and are not private properties, though the trust may not be clearly defined and may be such as not wholly to exclude some personal enjoyment or profit."

A regards the 3rd exception stated above, viz., the one founded on usage, it is intelligible enough on principle. The rule obtaining in all cases of endowments is primarily to be found in the intention expressed by the founder and in the absence of such, the usage obtaining in the institution. Usage is, however, given effect to not

1. (1876) I. L. R., 1 M. 235, P. C. S. C. L. R. 4 I. A. p. 76.

2. (1868) 3 Agra H. C. 226.

as overruling or contravening the intention of the founder but as an index of such intention.¹

It is, however, difficult to say whether the usage now obtaining in some of these ancient religious institutions, viz., that of trustees and archakas or both distributing among themselves the offerings offered to the deity is well-founded and legal. There is not strictly the question of the founder's intention in such a case. The offerings are made by the public for the propitiation of the deity and on account of its worship. *Prima facie* such offerings are made by the devotees not for the benefit of the God-server but for God. It is a strange conception of thought which allows the appropriation of these offerings not for the benefit of the deity but for the benefit of its human attendant. It, therefore, seems to us that the usage now prevailing in some of the temples and religious establishments of trustees or archakas appropriating the offerings made by the devotees is not altogether correct. The usage can be justified only upon the assumption that such offerings when made are intended for the benefit of the managers of the religious establishment or the human attendants of the idol. The *prima facie* inference suggested from the nature of the gift (as in the case of offerings for the propitiation of the deity) conflicts with this assumption and the usage has its origin in the attempt on the part of the trustees and archakas to distribute what *prima facie* belonged to God among themselves. This usage having grown up for a long time it is now almost forgotten that the offerings were ever intended to be given by the devotees to God. This practice has now become so inveterate that any attempt to enforce the trust on behalf of the idol with reference to the said offerings will be looked upon as trenching upon vested rights, so much so, that even if the offerings are made with the express intention that they are intended for the benefit of the idol, such intention will not be given effect to, as it would be said that the devotee must have known of the usage and must make his offerings only subject to that usage.

The general principle contended for by us, viz., that the offerings made by devotees are *prima facie* for the benefit of the idol

1. *Vide Gredharee Doss v. Nundokissore Doss*, (1867) 11 M. I. A., 405 at 428; *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*, (1874) L. R. 1, I. A. 209; *Rahuntulla Sahib v. Mahomed Akbar Sahib* (1875) 8 M. H. C. 63; *Gossain Dowlat Geer v. Bissessur Geer* (1873) 19 W. R. 215; *Venkatachalapati v. Subbarayudu* (1890) I L. R., 13 M. 293 at 299; *Ramalingam Pillai v. Vythilingam Pillai* (1893) I. L. R., 16 M. 499 (P. C.)

and not for its shevaks, is recognised in many of the Bombay and Calcutta cases,¹ and the said courts have held that the shevaks are not owners of temples nor are they owners of offerings. It is impossible to reconcile the principle laid down in these cases with the usage obtaining in some of the religious establishments in Madras except on the ground that the breach of trust has been perpetuated long enough to be forgotten.

Grants made to trustees are also capable of this double construction. The reason is plain. The trustee has a dual capacity. The one is his own personal right.² The other is the right of the person or estate for which he is trustee. In these two capacities he must be treated as different persons.³ Owing to his thus holding two capacities at the same time, it must always be a question of construction whether a particular grant is intended for his private benefit and is made in his individual right or whether it is intended for the benefit of the person or estate represented by him and is made in his capacity as trustee. Here, again, the test is to see to the intention of the donor as appearing from the grant and the surrounding circumstances of the case.

Thus where by a sanad, a sovereign prince (Mahratta) granted to a trustee of the Chinchavad Sevasthan certain properties on account of the worship &c., in honor of the shri (deity) it was held in *Shri Ganesh Dharmidhar Maharaj Dev v. Keshavraj Govind Kulgavkar*,⁴ that it was a question of construction of the sanad and that, according to such construction, the grant was one for the religious endowment and not for the private benefit of the trustee and his descendants.

In *Ram Dass v. Mohesur Deb Missree*,⁵ it was held that the grant by the Raja of Assam was not to the idol but to the religious fraternity of an already existing 'Tharo' or temple for the purpose of keeping up certain religious ceremonies⁶.

1. *Girijanand Datta Jha v. Sailajanand Datta Jha* (1896) I. L. R., 23 C. 645; *Thackersey Douraj v. Hurbh Nursey* (1884) I. L. R. 8 B. 432; *Manohar Ganesh Tambirkar v. Lakshmiram Govindram* (1887) I. L. R. 12 B 247; *Kalidas Jivram v. Gorpurjaram Haji*, (1890) I. L. R., 15 B 300; *Chintaman Bajaji Dev v. Dhondo Ganesh Dev* (1888) I. L. R., 15 B 612.
2. *Manohar Ganesh Tanbekar v. Lakshmiram Govindram*, *supra*; *Kalidas Jivram v. Gorpurjaram Haji*, *supra*; *Chintaman Bajaji Dev v. Dhondo Ganesh*

Dev, *supra*; *Goo-assen Sree Choundarpalee Bahoolce v. Gudhareeji*, (1868) 3 Agri H. C. 226 and vide the *Advocate General of Bombay v. David Haim Davaker* (1886) I. L. R., 11 B. 185.

3. *Tido Ramanathan Chettiar v. Levvu Marakayar* (1899) I. L. R., 23 M. 125.

4. (1890) I. L. R., 15 B 625.

5. (1867), 7 W R., C R., 446.

6. Cf. also *Rajaji Nursing Deb v. Roy Koylasanath* (1892) 9 M. I. A. 55.

In *Ranjit Singh v. Jagannath Prosad Gupta*,¹ it was, however, held that the gift to the trustee was not to his personal benefit or individual capacity but must enure for the benefit of the idol of which he was the trustee.

Grants of land or other property made to the trustee of a mutt are governed by the same principles. They are not grants of secular property intended for the trustee or Matadhipati of the mutt, but they are endowments in trust for the mutt and the charities connected therewith.² In *Khusalchand v. Mahdevgiri*,³ it was held by the Bombay High Court that a grant by a sovereign to a Gosavi and his disciples in perpetual succession is not equivalent to a grant to a man and his heirs and is intended by the grantor to be a perpetual fountain of merit producing benefit to himself and that his intention would be defeated by the diversion of the gift at the will of the grantor or his successors to purely secular uses.

On the same principle it was held by the Madras High Court in *Sathianama Bharati v. Saravanabagi Ammal*,⁴ that where there was a grant to the head of a Gosami Mutt to be enjoyed from generation to generation, and it was provided by the grant that the grantee was to improve the mutt and maintain the charity and be happy, the grant was an endowment in trust for the mutt and the charities connected therewith, though what might remain after the due execution of the trust was intended to be applied for the maintenance of the grantee and his descendants and that it was not merely a grant of private property to the original grantee.⁵

The motive actuating the grantor is immaterial if in fact the grant was intended by him for the private benefit of the grantee. Thus where a person granted certain properties to another on account of his pious and religious nature, the grant was really for his individual benefit and the motive of the grantor in making the

1 (1885) I. L. R., 12 C. 375.

3. 12 B. H. C. 214.

2. *Goosaeen Rree Choundanalee Bahoojee v. Girāhareeji* (1868) 3 Agra H. C. 226 and *Kolanda Mudali v. Sankara Bharati* (1882), 1. L. R., 5 M. 302.

4 (1894) I. L. R., 18 M. 266.

5. *Vide Gnana Sambanda Pandara v. Sellappa Chetty* (1875) 1. L. R., 2 M. 175.

grant does not convert it into a religious endowment. So, the direction in a grant that the donee and his issue should pray for the perpetuity of the then existing Government stands on the same principle and is no more than an inculcation of gratitude for the gift.²

In *Bibee Kuneez Fatima v. Bibee Saheba Jan*³ it was held by the Calcutta High Court that where a grant was made by the Nabobs to a certain person (Syed Mohamed Meer) because he had a large family to support and had to defray the expenses of the Khaukah, and his income had not been sufficient for these and for meeting the expenses of the abwabs and other heavy cesses which were accordingly remitted, there was no dedication to the God or to any religious or charitable purposes and that "the grant was personal and in his own right for furnishing the means of subsistence to the grantee. The motive of the grantor in making the grant might be the charitable disposition of the grantee. But his grant was not for charitable purposes."

Grants made to Mutawallis also rest on the same principle. A grant may be made to a person named because the grantor thought he was a pious man and charitably disposed. But the motive in making a gift is immaterial⁴ as already stated. The test is only what the intention of the donor is. Did he intend the person named to be the object of the gift or did he intend that the religious establishment or religious service was the object of the gift. This is apparently the reasoning upon which the case of *Sayad Mahomed Ali v. Sayad Gobar Ali* proceeds. It was held in this case that a grant to a man and his children without restriction as to names for his and their maintenance though the latter engaged themselves in praying for the perpetuity of the then existing Government was not a wakf and that the direction in the grant that the donee and his issue were to pray for the perpetuity of the then existing Government meant no more than an inculcation of gratitude for the gift. Such a direction was not a condition, and neither neglect to fulfil the direction, nor the downfall of the

1. (1881) *Ananta Thirtha Charari v. Nagamulnu Ambalagaren*, I. L. R., 4 M. 200.

2. *Sayad Mahomed Ali v. Sayad Gobar Ali* (1882) I. L. R., 6 B. 88.

3. (1867) 8 W. R. C. R., 313.

4. See cases in notes 1 and 2.

Government would have worked a forfeiture or avoidance of the grant.

If the grant be in favor of the institution or a religious endowment, the next question that has to be considered is whether the dedication is absolute in favor of the religious establishment or whether it amounts only to a charge in its favor, *i. e.*, whether the gift extends in favor of the religious establishment to the whole of the property conveyed or is only limited to a part of it as where a part of the income only is appropriated for the religious service or establishment.

The question that has to be considered in such cases is whether from the nature and terms of the gift the intention of the donor to confer on the grantee a beneficial and alienable interest in property to be utilized for the idol may be inferred or whether the intention of the donor was that the worship and endowments should remain in the family, the gift being entirely and solely to the idol. The *prima facie* presumption of Hindu Law is that endowments of this kind are of the latter class, *i. e.*, they are made usually with the object of preserving the *Sheba* in families, rather than of conferring a benefit on individuals. (*The Collector of Morshedabad v. Ranee Shebessuree and Rajah Chundernath Roy v. Kooar Gobindnath Roy*¹). As observed by their Lordships of the Privy Council in the above case : " It is more consonant with the genius and spirit of Hindu Law and usage that endowments of this kind should be made to a family, by whose members in succession, the worship might be performed, than to an individual who might sell or give them to a stranger"². But in the absence of any language denoting the intention of the donor that the gift should belong to the family, this presumption will not be sufficient of itself, to impress that construction upon the deed.

At the same time, however, it must be observed that in the case of a private religious endowment, *i. e.*, where a Hindu donor makes a bequest or gift of his property for his family idol, a large beneficial interest is given to the members of the family who are constituted shebaita of the idol³ though it is of course competent to the donor

1. (1872) 11 B. L. R., 86 S. C. 18 W. R. (P. C.) 226.
 2. *The P. C. cite the cases in* 1 S. D. L. R. p. 4 ; S. 6 11 W. R. (P. C.) 1. A. 180 ; 4 S. D. A. 343 ; 5 S. D. A. 210 ; 5 W. R. 266.
 3. *Radha Jeebun Moostuffy v. Taramoona Dossee* (1869) 12 M. I. A., 380 S. C. 2 B.

to make an absolute dedication of his property to the idol without leaving any beneficial interest or without a gift over of a beneficial interest in the surplus to the members of his family or to any one else. In such a case the property belongs to the idol, and no others will have any interest in it. As observed by the Privy Council in *Surendro Keshub Roy v. Doorga Soondery Dossee*,¹ "The testator shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, *i.e.*, to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakoors whom he venerates most. But the effect when the estate is large is to have some beneficial interest undisposed of."

A land is said to be absolutely wakf where the whole of the profits arising from it is devoted to religious purposes: *Puttoo Bibee v. Bhurrutt Lall Bhukut*.² There are other cases in which it was held that there was an absolute wakf and not simply a grant burdened with a trust.³

It is always a question of construction whether a deed makes property absolutely wakf so that the Muttawalli has no proprietary interest except as being the Muttawalli or whether it is a gift to the person named subject to certain trusts or duties and obligations in which case the person will have the proprietary interest but takes the property subject to the condition, *Sheikh Aboul Khalek v. Poran Bibee*.⁴ Of course, even where the estate is constituted as wakf the donor might give a portion of the income of such estate as an allowance for the trustee in which case the property is still wakf, but there is a charge in favor of the trustee, *Bishenchand Basawat v. Nudir Hossein*.⁵ For it is open to the donor at the time of the dedication to impose or annex any condition he pleases, and the donee must take it subject to that condition.⁶ A religious establishment or institution is no exception to this rule.

All these principles are equally applicable to the case of an idol. Even there it is a question of intention of the parties whether

1. (1892) I. L. R., 19 C. 513 (P. C.) W. R. 557; *Nallathambi, Battar v. Nallathumara Pillai* (1873) 7 M. H. C. 306.
 2. (1868) 10 W. R. C. R. 299.
 3. *Jaggodunba Dossee v. Puddomoney Dossee* (1875) 15 B. L. R., 318
 4. (1876) 25 W. R., 542 at p. 546.
 5. (1887) I. L. R., 15 C. 329 S. C.
 6. 15 I. A. p. 1 (P. C.)
 7. *Mercer v. Woodgate*, L.R., 5 Q.B. 20; *Morant v. Chemberlin* 6 H. & N. 541.

there has been an absolute dedication to the idol or there has been a gift of the property subject to some trusts in favor of the idol, *Ram Coomar Paul v. Jogendronath Paul*¹. In *Rajender Dutt v. Shamchund Miller*² it was held that there was an absolute dedication.

It is consistent with the case of an absolute dedication that the donor has provided that the trustee should live in a portion of the trust property. So it has been held in *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen*³ that the provision that the testator's family should live did not give any beneficial interest in the property to such members and did not make the transaction a bare charge in favor of the idol, but was only consistent with the dedication being absolute⁴. As to the extent of this right of residence in such a case, it is reasonable in the absence of express provision to look to the mode of living adopted by the testator his life for himself and his members.⁵

Of course, as has already been observed the donor might, without making an absolute dedication, either create a charge in favor of the idol or religious establishment leaving the beneficial interest in favor of a private person who will then take the property burdened with the trust or the donor may grant a part of the property or of its income to the idol or religious establishment leaving the surplus to others to hold as private property. These cases must be distinguished from another class of cases already adverted to viz., where the estate is given to the idol but subject to some charge or allowance created in favor of the trustee. We shall point out the difference between the two presently.

In *Ashutosh Dutt v. Doorgachurn Chatterjee*⁶, the Privy Council held that where a Hindu lady bequeathed to her sons certain property to support the daily worship of an idol and to defray the expenses of certain religious ceremonies with a provision that in the event of there being a surplus after these uses

1. (1878), I. L. R., 4 C. 56, S. C. 2

C. L. R. 310,

2. (1880), I. L. R., 6 C. 106.

3. (1897), I. L. R., 25 C. 112.

4. See also *Goswami Shri Girdharji v. Madhoddas Premji*, (1893), I. L. R., 17 B. 600.

5. (1879), I. L. R. 6, I. A. 182; S. C. I. L. R., 5 C. 438 (P. C.); S. C. 5 C. L. R., 296.

had been satisfied out of the revenue, such surplus should be applied for the support of the family, that the dedication was not absolute, but there was a valid trust in favor of the idol and that the surplus remained private property.

There are several cases in the reports in which it was held that there was a trust with reference to an idol¹ and with reference to wakfs² while there are several others in which it was held that there was only a charge in favor of the idol³ or for wakf purposes⁴ while the beneficial interest in the whole property vested in private owners.

Thus it will be seen that a transaction of this sort may be of four kinds.

1st. An absolute dedication in which the entire beneficial interest is with the idol or religious establishment.

2nd. A dedication to the idol or religious establishment, but there is a charge created as to part of the income in favor of a private person.

3rd. A gift as to part of the income in favor of the idol or religious establishment so that there is a trust to that extent while the surplus is given to the trustee in his private capacity.

4th. The whole property is given to a certain person, but there is a charge created in favor of the idol or religious establishment as regards a portion of the income.

The legal effect of these different kinds of dedication has next to be considered, and the distinction is only important with reference to the different legal effects produced.

In the 1st class of cases *i. e.*, where there is an absolute dedication, the property cannot be sold or alienated by the trustee or manager except for certain purposes recognised by law. Such

1. *Sonatin Bysack v. Sreemutty Jugut Soondree Dossee* (1859) 8 M. I. A. 66; *Kumara Asuna Krishna Deb v. Kumara Kumara Krishna Deb* (1868) 2 B. L. R. O. O. 11 at p. 39 (Per Peacock, J.). *Mohamaya Dossee v. Bindoo Basunnee Dossee* (1872) 19 W. P. O. R. 35; *Kally Prosono Mitter v. Gopee Nauth Kur*, (1890) 7 O. L. R. 241 and *Girijanund Dattajha v. Saila Jamund Dattajha* (1896) 1 L. R. 23 C. 645.
2. *Ghulam Hussain Saib Saiyad v. Asi Ajam Tadallah Saib Kurashu* (1868) 4 M. H. C. 44, and *Kazi Hassan v. Sagun Bal Krishna* [1899] 1 L. R. 24 B. 170 Per Ramade, J.

3. *Shookmoy Olunder Das v. Manohari Dassi* [1881] 1 L. R. 7 C. 269; *Kumarasami v. Subbaraya*, [1886] 1 L. R. 9 M. 325 and *Surendro Keshub Roy v. Doorga Soondary Dossee* [1892] J. L. R. 19 C. 518 P. C.
4. *Pathukutti v. Avathala Kutti*, [1889] 1 L. R. 13 M. 66 Per Shephard, J., *Parker and Muthusami Iyer, JJ.*, however, held in this case that the wakf was invalid as the gift to wakf depended on a contingency, and *Baikam Mia v. Shuk Lal Poddar* [1892] 1 L. R. 20 C. 116.

alienation will be altogether invalid¹ and it follows that the property is not divisible among the trustees.²

Even in the 2nd case the property is not alienable. Thus in *Bishen Chand Basawat v. Nadir Hossein*³ the question arose whether property constituted as wakf (under a wakfnama by which property was given to the donor's grandson in trust for the performance of certain religious ceremonies, &c., subject to allowances in favor of the trustee and the donor's son and daughter) was attachable either in whole or part in execution of a personal decree against the trustee and their Lordships of the Privy Council in holding that such property was not attachable altogether observed: "If the whole property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan Law? For example that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurram and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feelings frequently exist between Hindus and

1. *Futto Bibee v. Bhurrit Lall Bhukut* (1868), 10 W. R. C. R. 299; *Basoo Dhul v. Kushev Chunder Geer Gossain* (1870) 13 W. R. C. R. 200; *Golak Chunder Bose v. Raghoonath Sree Chunden Roy* (1872) 17 W. R. C. R. 444, S. C. 11 B. L. R. 337 note; *The Collector of Moorshedabad v. Ranee Shebessuree* (1872), 11 B. L. R. 86; S. C. 18 W. R. 226 P. C.; *Bumcarree Chandra Thakoor v. Mudden Mohan Chutturaj* (1873), 21 W. R.

C. R. 41; *Sheik Abdool Khalek v. Poran Bibee* [1876] 25 W. R. 542 [546].

2. (1887) L. R. 15 I. A. 1; S. C. I. L. R. 15 C. 329.

3. *Bumcarree Chandra Thakoor v. Mudden Mohan Chutturaj* [1873], 21 W. R. C. R. 41, *Ram Oommar Bal v. Jogender-nath Pal* [1878] L. R. 4 C. 561; S. C. 2 C. L. R. 310.

Mahomedans at the time of the Mohurram... ..
 The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties. Under section 266, C. P. C. judgment-creditor can attach property over which judgment-debtor has disposing power, and if there was any surplus in the trustee's hands for the benefit of the judgment-debtor, it would not entitle the judgment-creditor to attach and sell the whole or any specific portion of the corpus of the estate."

The 3rd and 4th classes of cases are similar. In such cases the property may be sold or alienated subject to the trust or charge and the property is held to be divisible among the members.¹

NOTES OF INDIAN CASES.

Chitta Singh v. Debi Din, I. L. R., 24A. 170.—A subsequent mortgagee who was not impleaded in a suit upon the first mortgage sues for a declaration that the property is not liable to be sold under the decree of the first mortgagee. The mortgage being found to be true we should imagine that it lay upon the defendant to prove that it was discharged and that the mortgagee had no subsisting interest. But there was a peculiarity in the case to take it out of the ordinary rule. The mortgage was a mortgage with possession and the profits of the property which had accrued during the period for which the mortgagee was in possession would suffice to satisfy the mortgage but for the stipulation in the mortgage instrument that the profits after appropriation of the interest should be paid over to the mortgagor. If the profits had been so paid the mortgage would subsist. But if the burden of proving

1. *Sonatun Byrach v. Sisemutty Juggut Chutturaj* [1873], 21 W. R. C. R. 41; *Sherk Soondrie Dossee* [1859] 8 M. I. A. 66; *Futtoo Abdool Khalek v. Poran Bibee* [1876] 25 Bibee v. Bhurruo Lall Bhukut, [1868] 10 W. R. C. R. 542 546; *Ashutosh Dutt v. W. R. C. R. 299*, *Bisoo Dhul v. Kishen Doorga Churn Chatterjee*, 1879, I. L. R. 6 I. A. *Chunder Goer Gossain*, [1870] 13 W. R. C. R. 182 S. C. I. L. R. 5 C. 438 P. C. S. C. 5 200, *Golak Chundoi Bose v. Raghoonath C. L. R. 296*, *Shookmoy Chunder Das v. Sree Chunder Roy* [1872], 17 W. R. C. R. *Manohari Dass* (1881) I. L. R. T. C. 269; 441; S. C. 11 B. L. R. 337 note; *The Col. Rajender Dutt v. Shafichund Mitter* [1880] *lector of Moorshedabad v. Rames Shebessuree*, I. L. R. 6 C. 106; *Raghunath Dial v. Kesho* [1872], 18 W. R. P. C. 226 S. C. 11 B. L. *Ramany Das* [1888] I. L. R. 11 A. 18 F. B.; R. 86, *Mohamaya Dossee v. Bindoo Bashi- Suppammal v. The Collector of Tanjore* *nee Dossee* [1872], 19 W. R. C. R. 35, *Bun-* [1889] I. L. R. 12 M. 387; and *Bhugobutty waree Chand Thakoor v. Mudden Mohan Prosonno Sen v. Gooroo Prosonno Sen* [1897] I. L. R. 25 C. 112.

such statement should lie upon the mortgagee, the burden being shifted from the defendant and the plaintiff having failed to discharge it, the court rightly refused the declaration asked for.

Narayana Aiyar v. Venkataramana Aiyar, I. L. R., 25 M. 220.

—In 9 M. L. J. 16, we ventured respectfully to express our dissent from the decision of the majority of the Full Bench in *Ramachandra Rayaguru v. Modhu Padhi*.¹ We are glad to find that decision has now been overruled by a unanimous Full Bench of five judges in the case under notice. In the order of reference which is really the judgment of the Full Bench, Mr. Justice *Bhashyam Aiyangar* has shown that Art. 147 of the Limitation Act and not Art. 132 applies to a suit for sale upon a mortgage. We have nothing to add to the excellent reasons assigned in the judgment for the conclusion arrived at. The controversy will now be transferred to the question as to what is a mortgage or more specifically whether an hypothecation is a simple mortgage or a charge. Until that is set at rest, there will still be trouble in the application of the right article.

Mallikarjunadu Setti v. Lingamurti Pantulu, etc., I. L. R., 25

M. 244.—The decision of the Full Bench in these cases has set at rest several vexed questions in the construction of the Transfer of Property Act. We have no doubt that the Full Bench has taken a view both sound and beneficial. In the first place, the Full Bench holds that Ss. 310A and 311 of the C. P. C. are applicable to sales under mortgage decrees under the Transfer of Property Act. All the High Courts of India except the High Court of Calcutta, are agreed upon this view. Even the High Court of Calcutta which has taken a contrary view with reference to S. 310A must find it difficult to reconcile it with the view which has always prevailed with the approval of the Privy Council with reference to S. 311. The exhaustive judgment of Mr. Justice *Bhashyam Aiyangar* leaves nothing to be desired. There is much to be said in favour of the somewhat novel view which he has enunciated as regards the rule-making scope under S. 104, viz., that it should not conflict with any provisions of the Code to which the rule-making power under S. 15 of the Charter Act is subject. The question raised is interesting and difficult. It is enough for us at present to say that although some difficulties occur to us we do not think the argument is assailable.

1. I. L. R., 21 M. 326.

On the question as to the nature of the order absolute for sale we agree with the majority that it is really an order in execution. There has been much confusion caused upon the subject by several of the not easily reconcileable decisions of the Calcutta and Allahabad High Courts. There is one characteristic feature of Mr. Justice *Bhashyam Aiyangar's* judgments which we commend to the attention of our readers viz., that they are not merely categorical answers to the questions directly arising for decision but like the judgments of great English Judges exhaustive the principles of the law on the questions arising and the topics logically connected therewith. *

Vedapurati v. Vallabha Valia Rajah, I. L. R., 25 M. 300 :— In 2 M. L. J. 387 we criticised at length the view of the Madras High Court that a second suit for redemption may be instituted by the mortgagor after a prior decree for redemption had become incapable of execution by means of limitation and expressed the hope that the stream of authority in the Madras High Court might be stemmed by a Full Bench or by the Privy Council. The cases taking the erroneous view had become so numerous that we had begun to despair of this consummation being brought about. Fortunately this was a case of hope deferred. A Full Bench of five judges have in a unanimous judgment pronounced the course of decisions in this Presidency to be wrong. The wealth of illustration and force of reasoning employed in the leading judgment of Mr. Justice *Bhashyam Aiyangar* have, we trust, effectually destroyed the heresy.

There is one point that we note and which the reporter does not bring out in his head-note viz., that the majority of the judges have expressed their dissent from the earlier view that the time for redemption cannot be extended except when an application is made by the mortgagee for foreclosure or sale. There is nothing in the Act to prevent extension at the instance of the mortgagor after the time provided in the decree if the Court is satisfied that the mortgagor has shown good grounds for further extension.

Sitaram v. Madho Lal, I. L. R., 24 A. 44 :—It is a matter for surprise that at the time when the Madras High Court was discovering its error in the series of decisions sanctioning a second suit for redemption and approving of the Allahabad view in *David Hay v. Razi-ud-din*¹ the latter court has abjured that as heresy and discovered wisdom in the Madras cases. The pity of it is that it is a

1, I. L. R., 19 A. 205.

Full Bench of three judges that has now overruled the earlier view in *David Hay v. Razi-ud-din*¹ which however has been accepted in a more elaborate judgment by Mr. Justice *Bhashyam Aiyangar* and his colleagues in Madras. After the judgments in *Vedapuratti v. Vallabha Valia Rajah*,² and especially after Mr. Justice *Bhashyam Aiyangar's* among them, the contrary view is really unarguable. We trust that a larger Full Bench of Allahabad will reconsider this pronouncement of three judges and re-establish the sounder view of the earlier Allahabad cases.

• *Chhiddu v. Naubat*, I. L. R., 24 A. 67:—We are not satisfied that the right view of the Hindu Law has been laid down in this case, though in the face of Legislatures fighting shy of all reforms in the Hindu Law one may not be sorry to see judges unconsciously amending it. It is difficult and anomalous to hold on the authority merely of the definition of stridhanam in the Mitakshara that the share taken by the mother on partition among the sons is held by her as stridhanam at her absolute disposal though it is well settled that if she took the whole in succession, she would only take a limited interest in it. Once the Mitakshara definition of stridhanam is discarded, and it has been on the highest authority, there is no means of escape from the position that a widow's estate in property inherited from a male is only limited. The only argument in support of the contrary view taken by Mr. Justice *Aikman*, that appears to us to have any force, is the quotation from the Mitakshara Ch. 1 S. 6 Cl. 2, showing that where partition has been made by the father in his life-time giving a share to his wife, the after-born son takes that wife's property only in the absence of a daughter. Assuming that this statement is good law now, we think that the character of the property taken by the mother on partition must be settled by the closer analogy of the character of property inherited in entirety. We note, however, that Mr. Justice *Banerji* has expressed his concurrence only after much hesitation.

Kaliyan Rai v. Ram Chander, I. L. R., 24 A. 128:—This case raises a somewhat difficult question of Hindu Law. It must be confessed that the Mitakshara is obscure on the subject, and neither the Sanskrit commentators nor the English text-writers are agreed as to the place of the brother's grandson in the order of

1. I. L. R., 19 A. 205.

2. I. L. R., 25 M. 300.

succession *i. e.*, whether he is entitled to preference over the paternal uncle's son under the Mitakshara Law. We are inclined to agree with the view taken by the Allahabad Court that he is entitled to such preference. The Madras High Court had no doubt the authority of the Chandrika in support of the contrary view. But we think the difficulty of assigning the brother's grandson his proper place on that view is almost insuperable, and there is more logical symmetry and consistency with recognised rules of interpretation in allowing him to come in after the brother's son. In the face of problems like this one desires very much indeed the possibility of an authoritative pronouncement by the Legislature. But the Hindu Law seems to be forbidden ground for the Legislature and an unthinking public lashes itself into activity against the only means of remedying doubtful litigation.

Behari Lal v. Majid Ali, I. L. R., 24 A. 138 :—An *ex parte* order in execution has as much the force of *res judicata* with reference to the contentions that the defendant might have raised to prevent execution as an order passed upon contest. The learned judge proceeded to point out that the rule must be the same with reference to execution petition as with reference to suits. An *ex parte* decree in a suit has the force of *res judicata* notwithstanding the contrary view in *Sellathammal v. Oliver* in 9 M. L. J. R. 60. If an *ex parte* decree is not *res judicata*, can it be that a second suit may be brought or that the decree is not a good defence to a suit raising the same question? The trouble arises from the explanation of the word 'final' in section 13, C. P. C. But we think the word 'review' in explanation 4 must be understood liberally so as to include applications to set aside *ex parte* decrees. At all events the Allahabad High Court is clear that an *ex parte* decree has the force of *res judicata*.

King Emperor v. Kaliji, I. L. R., 24 A. 143 :—The language of the Penal Code does not often give rise to difficulty of construction thanks to the literary excellence of Macaulay's perspicuous draft. But the question of self-defence often gives rise to some trouble. There are cases on both sides of the line holding certain actions sometimes within the limit of private defence and sometimes not. The difficulty rather is one relating to the exact application of the law to the facts than any difficulty as to the statement of the

law itself. With reference to the exercise of it in relation to property the difficulty often arises with reference to cl. 3 of section 99. If in the case under notice the party in possession were on the land at the time of the unlawful entry of the trespassers, there can be no doubt of their right to resist the trespass and we cannot therefore accept the very wide language¹ of *Queen-Empress v. Prag Dat*, quoted by Mr. Justice *Banerji*. But in the circumstances of the case where the accused were not upon the land and had retired to a distance to watch the trespassers commencing operations and held a consultation and came after an interval to attack the trespassers, it might naturally be expected that there was time to seek the protection of the authorities and the violence attributed to a criminal intention to inflict bodily injury upon the trespassers. It must be confessed, however, that the question involved in the case has not been considered by the learned judge with reference to the language of the Penal Code.

King Emperor v. Fyazuddin, I. L. R., 24 A. 148 :—We are inclined to agree with Mr. Justice *Prinsep* in *Queen-Empress v. Imam Mondal*² that a person against whom proceedings are taken under S. 110 of the Cr P. C. is not an accused person within S. 437 of the Code. The District Magistrate has therefore no power to order further inquiry under that section after a discharge by a First Class Magistrate under S. 119. True S. 403 does not preclude fresh proceedings upon the same evidence. But if the District Magistrate means to take fresh proceedings after a discharge by a First Class Magistrate under S. 119, so may a First Class Magistrate institute fresh proceedings after a District Magistrate has made a discharge under S. 119. This course is obviously undesirable. We conceive, therefore, that though not as a matter of law, yet, as a matter of practice, no fresh proceedings ought to be instituted except upon fresh materials.

King Emperor v. Munna, I. L. R., 24 A. 151 :—We are rather doubtful as regards this decision by *Aikman, J.*, that Cl. 2 of S. 107, authorises proceedings being taken against a person outside the jurisdiction only before District Magistrates or Presidency Magistrates. *Aikman, J.*, says that this means that only proceedings shall not be commenced but that they may be transferred to other magistrates

1, I. L. R., 20 A 459.

2, I. L. R., 27 C. 662.

under S.192, Cl. 2 of section 107 is not confined to proceedings being commenced. We think the object of the section is that only District and Presidency Magistrates should be competent to take cognizance of persons outside jurisdiction.

King Emperor v. Motilal, I. L. R., 24 A. 156 :—We must observe in the first place that the head note is not quite accurate. We do not understand the learned judge to decide that the facts found would not amount to an offence under S. 504. It does not require much argument to show that throwing the shoe amidst a company of Brahmins seated at a religious feast is intended to insult the body or any member thereof and likely to cause a breach of the peace. This particular offence was not charged and the learned judge probably thought there might be evidence and explanation to be considered before a conviction.

Gobind Prasad v. Mohan Lal, I. L. R., 21 A. 157 :—We are glad to note the unambiguous pronouncement of *Stanley*, C. J., and *Burkitt*, J., in recognition of the possessory title or the right of the possessor of property against all but the true owner. The principle of law is clear and there is abundant authority in support of the proposition. But there has been ever recurring confusion on the subject.

SUMMARY OF RECENT CASES.

Harburg India Rubber Comb Company v. Martin [1902],

1 K. B. 778.

Statute of Frauds 34—*Indemnity*—*Main object of contract*.

The Statute of Frauds; S. 4, applies only to promises made to the person to whom another is already or is to become answerable. But a guarantee, or indemnity which creates an original liability and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor is not within the section.

The cases which held that certain contracts were outside section 4, i. e., which though coming within the words of the statute were exceptions to it, may be grouped under 3 convenient headings.

(a) *property cases*; (b) *document cases*, and (c) *del credere cases*.

All these cases rest on the principle that there is some larger object of the contract, such larger object being the main object of the contract, while the obligation to pay the debt of another was merely *incidental* to such main object.

The subject-matter of the contract in the '*property cases*' is the relief of property from liability or the acquisition of property. The '*property cases*' involve either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

The subject-matter of the contract in the '*document cases*' is the purchase of security or the getting rid of incumbrances, and the fact of becoming answerable for the debt of another is not the main object of the contract. Where a person holds documents as security for a debt and another asks him to hand over the documents on payment of the debt there is simply a purchase of the security.

In the '*del credere cases*' the subject-matter of the contract is the employment of a *del credere* agent and the securing greater diligence in the performance of the duty of a factor and the answering the debt of another is merely incidental to such object.

Where, therefore, the plaintiff, a creditor of a company, recovered a judgment-debt against the company and delivered to the sheriff a writ of *fi. fa.* but the sheriff could not enter and the defendant who was a director and had a large interest as the shareholder of the company, orally promised the plaintiff that he would endorse bills for the amount of the debt:—

Held, that this promise was not a contract of indemnity, but was a promise to answer for the debt of another within S. 4 of the Statute of Frauds, and that the contract not being in writing, an action for the breach of it could not be maintained.

Neale v. Lady Gordon Lennox [1902], 1 K. B. 838.

Counsel's authority—Limitation by client—Effect of.

A counsel appearing for a party in an action is held out by him as having authority and has full authority as to all matters which relate to the conduct of the action and its settlement; and notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side.

It is well settled that the power to refer a case to arbitration and the power to compromise a case, (and in cases of defamation and malicious prosecution, with or without a term that all imputations should be withdrawn) are within the general ambit of counsel's authority.

As to the effect of a limitation upon the general authority of counsel, a secret limitation uncommunicated to the other side has no effect, and a compromise of the case effected by counsel is binding on the client notwithstanding such limitation.

These principles are applicable notwithstanding the fact that the arrangement made by counsel was not a final settlement of the action, and that the order made in pursuance of such arrangement was only interlocutory and not final.

Where, therefore, in an action for slander the plaintiff authorized her counsel to agree to a reference only on the defendant withdrawing the imputations and this limitation was not known to the other side, and the plaintiff's counsel agreed to a reference without any statement disclaiming imputations by defendant, and an order of reference was made and there was no mistake or misapprehension as to the extent of the authority:—

Held, that the plaintiff was bound by the arrangement and he could not set aside the order of reference as being merely an interlocutory order.

Rex v. Hadwen [1902], 1 K. B. 882.

Prisoner's evidence—Joint indictment—Cross-examination by co-prisoner.

Where two prisoners are jointly indicted for certain offences and one of them gives evidence under section 1 of the Criminal Evidence Act, 1898, and in such evidence incriminates the second prisoner, the latter is entitled to cross-examine the former, just as he would be entitled to cross-examine the witnesses called by the 1st prisoner.

Birch v. Birch [1902], P. 130.

Probate—Fraud—Suit to set aside—Frivolous action.

An action may be maintained to set aside a probate on the ground that it has been procured by the fraud of a party to the

action or his agent. It is not sufficient for the plaintiff in such a case to allege fraud, but he must shew a reasonable possibility of the alleged fraud being established. A mere general allegation of fraud without particulars cannot avail.

Prima facie the court ought to treat as frivolous any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment and raising a reasonable probability of the action succeeding. The test is "Is the fact alleged to have been discovered so evidenced and so material, as to make it reasonably probable that the action will succeed?"

JOTTINGS AND CUTTINGS.

Chief Justice Marshall:—We have the pleasure to acknowledge the receipt of an excellent portrait of Chief Justice Marshall, one of the greatest, if not the greatest, Judge of the Supreme Court of the United States, from the Lawyers' Co-operative Publishing Company of Rochester, New York. The portrait will be supplied free to any one who remits 50 cents, the annual subscription for "Case and Comment," an interesting little periodical published by the firm.

* * *

Revision of appellate orders in sanction proceedings:—It would seem surprising that nobody had discovered that no revision lay under the Criminal Procedure Code from an order of sanction by a civil court confirmed or quashed by another civil court on appeal, but for the fact that with most of us it is the habit of the mind to move in accustomed grooves of thought. S. 195 of the Criminal Procedure Code gives the right of appeal from an order granting or refusing sanction passed by a civil or criminal court. The appeal lies to the court to which appeals ordinarily lie from the original court; and if the original court were a civil court, the appeal is to another civil court and not to a criminal court. There is no abstract question as to whether an order of sanction to prosecute is a civil or criminal proceeding. It is a civil proceeding if passed by a civil court, and a criminal proceeding if passed by a criminal court.

S. 485, Cr. P. C., confines the revisional jurisdiction to proceedings of inferior criminal courts; and although S. 439 speaks of the High Court exercising in revision the powers of an appellate court under S. 195, that can only be where there is revisional jurisdiction under the Criminal Procedure Code itself, as where the order of sanction is passed or refused by a criminal court on appeal. The matter seems somewhat elementary, and although the point is of every day occurrence, it is perhaps not altogether creditable to the profession that the discovery was not made until Mr. Justice *Bhashyam Aiyangar* announced it from the Bench. The problem then is, whether the High Court has any power of interference with an order relating to sanction passed by a civil court on appeal under S. 195. There is, of course, the power of superintendence under the Charter Act. But it has generally been unduly narrowed to cases of jurisdiction. It may be S. 622, C. P. C., will apply. But that again is confined to cases of jurisdiction and material irregularity. It is perhaps to be regretted that the larger powers of interference under S. 439 should not exist with regard to orders of sanction by civil courts, for, generally, wrong ideas prevail among inferior courts as regards the circumstances under which sanction should be granted. It is too often the practice of judges to say, and even judges of the High Court are not always free from this failing, that an order of sanction means nothing more than that there is a case for enquiry, and that if the man were innocent he might welcome the opportunity for clearing his character. The question may be asked how many of these gentlemen who make this remark so lightly would welcome such an opportunity in their own selves. The worry and anxiety of a criminal trial are great to the most innocent man; and there is no confidence in the courts that the most assured innocence is always established to the satisfaction of the presiding officers; and that there are not influences at work which are apt to mislead them. Again, orders of sanction where the trials do not end in conviction are apt to disquiet and unsettle the public mind. We are not sure that it was present to the mind of the Legislature when S. 439 was enacted that the High Court would have no power of revision under it over orders relating to sanction passed by civil courts on appeal. But the point, however, seems to be clear.

CONTEMPORARY LEGAL LITERATURE.

Harvard Law Review :—In the June Number of this valuable Review there is an interesting and learned article on contracts for the benefit of a third person by Mr. Samuel Williston. The subject-matter of the article is with reference to promises for the benefit of a third party, and the writer there asks the reader to distinguish the following cases :—(a) cases where rights of property arise simultaneously with the making of a contract which will include cases of trust, (b) cases of revocable agency, (c) novations and (d) promises to one who has not given the consideration for the promise. He divides the subject-matter of his article into two classes, 1st :—promises where the promisee has no pecuniary interest in the performance of the contract, his object being to benefit a third person, and 2ndly, promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay his creditor. In both classes of cases it is well settled in English Law that only the promisee is entitled to enforce the contract and that it is not enforceable by the third person. He wishes very much that the law were otherwise at least in the first class of cases, and he points out that in some States of America the English rule is not followed, while in some States this result is arrived at by statute. The English rule is not followed in cases where life insurance policies are taken for the benefit of third persons and where a purchaser of property subject to a mortgage assumes and agrees to pay the mortgagee. The third person and the mortgagee are held entitled to sue the insurance company and the purchaser respectively though they were not direct parties to the transaction.

* * *

The Law Students' Journal :—In the August Number of this Journal there is a short article on the doctrine of constructive fraud by Mr. George Baron. It purports to be only an epitome of the case-law on the subject. The writer says that three classes of transactions fall within the doctrine—(1) those which tend to deceive or mislead others ; sales by expectant heirs and cases where one having a secret title stands by and encourages a purchaser from one having a fallacious title are said to illustrate this ; (2) transactions which violate public or private confidence ; transactions between parent and child, solicitor and client, guardian and ward illustrate this class ; and (3)

transactions which tend to impair public interest, agreements to restrain or procure marriage, agreements to suppress criminal proceedings, to procure public officers are said to fall within this class,

We beg to acknowledge receipt of the following publications :—

Canadian Law Times	for	...	...	August.
Indian Review	"	...	...	do.
The Bombay Law Reporter	"	...	...	do.
The Law Students' Helper	"	...	...	July.
Canada Law Journal	"	...	...	July and August.
The Law Students' Journal	"	...	...	August.
The Kathiawar Law Reports	"	...	...	do.
The Case and Comment	"	...	...	July.
The Law Magazine and Review	"	...	...	August
Law Notes	"	...	...	do.
American Lawyer	"	...	...	July.
American Law Review	"	...	...	August.
Educational Review	"	...	...	do.
The Digest	"	...	...	do.
The Calcutta Weekly Notes	"	...	...	do.
The Punjab Law Reports	"	...	...	do.
The Lawyer	"	...	...	July and August.
Kathiawar Law Reports	"	...	...	August.
The Indian Review	"	...	...	do.
General Digest, American and English	...	...	...	Dec. 1901.
"	"	...	...	Feb. 1902.
"	"	...	...	April 1902.
New York State Library	...	...	...	December 1901.

Legislation 15—Comparative Summary and Index of Legislation in 1901.

Legislation 16—Review of Legislation, 1901.

The Acts of the Governor-General of India in Council for the year 1901—Published by Desai Narotam, Pleader, High Court, Bombay.

Legislative Acts of the Governor-General of India in Council 1900 with Index.



The Madras Law Journal.

PARTS IX & X.] SEPT. & OCT., 1902. [VOL. XII.

SOME PROBLEMS OF HINDU LAW.

I.—Illegitimate son's rights.

THERE is no chapter on the Hindu Law of Inheritance more difficult than the one dealing with the rights of the illegitimate son of a Sudra. It is generally stated that he has no right to succeed to collaterals. To test the correctness of this position we may take specific instances of persons who may be regarded as collaterals and see whether the illegitimate son is heir to such persons. Take the case of a legitimate brother dying possessed of separate property but leaving no issue, widow, daughter, daughter's son, parents, or brothers of the whole or half-blood except an illegitimate brother. Does the illegitimate brother succeed to his legitimate brother's self-acquired property? At the first blush it would seem that he ought to succeed, as the authority of the Privy Council in *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*,¹ is to the effect that the illegitimate brother is a coparcener with his legitimate brother and succeeds to the joint property by right of survivorship, in the absence of the legitimate brother's issue and to the exclusion of the widow, daughter daughter's son. A little consideration, however, will show that this decision of the Privy Council does not necessarily lead to the result that the illegitimate brother should be the heir of his legitimate brother. Persons may be coparceners and yet such persons may not be heirs. Under the early Hindu Law, moreover, there were many secondary sons who could be heirs to the father or who could share in the father's property and presumably be coparceners and yet many of them were declared not to be heirs to collaterals. Even in the case of adopted sons it was once the prevailing opinion that

1. I. L. R. 18 C. 51; S. O., L. R. 17 I. A. 128.

they did not succeed to collaterals ; at any rate, there was a considerable body of judicial dicta to that effect. It is expressly declared in the Mitakshara that adopted sons succeed to collaterals and the Judicial Committee in *Pudma Coomari Debi v. Court of Wards*,¹ following this text of the Mitakshara, ruled that the adopted son succeeds not only lineally but also collaterally. The real question is whether the word 'brothers' in the Mitakshara, Chapter II, sec. I, pl. 2 and sec. IV includes also illegitimate brothers. We have the authority of Mr. Justice *Banerji* in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*,² that the word 'brothers' there refers to sons of a wedded wife. Though the provisions of pl. 5 and 6 of the Mitakshara, Ch. II, sec. IV, are not necessarily inconsistent with the view that the illegitimate brothers may be '*bhinnodaras*' or brothers of the half blood or by different mothers, yet, on the whole, it may be taken that the author of the Mitakshara was referring to sons of a wedded wife or wives. Mr. Justice *Nanabhai Haridas*,³ however, in *Sadu v. Baiza*,⁴ observed at p. 46, that the illegitimate son "is their (sons') brother not only in the popular but also in the legal acceptance of the term is evident from the Mitakshara, Ch. I, Sec. XII, pl. 42, where they (sons) are spoken of by Yajnavalkya as his 'brethren' and 'brothers'."

Shome Shankar Rajendra Varere v. Rajesar Swami Jangam,⁴ is an express authority for the view that the illegitimate son is not entitled to succeed to his legitimate brother. *A fortiori* it would follow that he could not succeed to other collaterals. See *Krishnayya v. Muthusami*,⁵ *Ranoji v. Kandoji*,⁶ *Parvati v. Tirumalai*;⁷ *Karuppa Goundan v. Kumarasami Goundan*,⁸ which was, however, a case of a coparcenary claim ; and *Ramalinga Muppan v. Pavadai Goundan*.⁹ The last case seems to treat the question of the illegitimate son's disability to succeed to collaterals as settled.

Does the illegitimate son succeed to his father's father's estate ? Though he is not strictly a collateral, yet the analogy may be said to apply and such illegitimate son may not be entitled to take his putative father's father's estate. Even if the view that the illegitimate son's legitimate son has rights should prevail, as being the

1. L. R. 8 I. A. 229.

2. I. L. R. 21 A. 39.

3. I. L. R. 4 B. 37.

4. I. L. R. 21 A. 99.

5. I. L. R. 7 M. 407.

6. I. L. R. 8 M. 557.

7. I. L. R. 10 M. 334.

8. I. L. R. 25 M. 429.

9. 11 M. L. J. 399.

sound one, it does not necessarily follow that the legitimate son's illegitimate son should have similar rights. The legitimate son's issue (*i.e.*, legitimate son's sons and son's grandsons) take the legitimate son's share by right of representation. This is because the word 'Putra' or 'Parivita Putra,' includes grandson and great-grandson (both legitimate). According to the ordinary canons of interpretation, the same word cannot be used in two senses, *i.e.*, it cannot be used both in its primary and secondary meanings. If by those words are meant legitimate grandson and great-grandson, it follows that they cannot be understood at the same time to include the illegitimate son or grandson of the legitimate son. Hence the legitimate son's illegitimate sons will not be entitled to take. Moreover the principle of Hindu Law would seem to confer this right of representation only on legitimate issue.

In this connection we may refer to a certain passage in the *Madana Parijata*, a leading authority in the Benares School, which may have some bearing upon this point. In treating of the right of grandsons, Viswesvara Bhatta says, "*Sudrāt dāsyāmutpannasya pauṭtrasyāpi evamēva svāmyam, paramtu vibhāgē visēshah.*" These words, strictly speaking, point only to the grandson who is himself an illegitimate son. They do not, strictly speaking, cover the case of the illegitimate son's legitimate son. So construed the meaning of the passage is this: "The ownership of the grandson who is begotten by a Sudra upon his concubine is the same; however, there is a distinction as to division." The author, is at first speaking of the legitimate grandson's rights. He then refers to the rights of these other grandsons. This may lead some to think that the author here refers to the rights of the illegitimate son's legitimate son. It may be that the author's intention was to refer to the rights of illegitimate son's legitimate son, or it may be that the author intended to refer to illegitimate son's legitimate and illegitimate sons, and to place all grandsons alike except in respect to the share on division. But the author has not expressed this intention in the above passage. Taking the passage in its grammatical sense, it is difficult to say what it covers. One thing is certain. It denotes that the grandson himself is the offspring of a Sudra's concubine. It may, therefore, apply to the following cases:—

- (1) Son's illegitimate son.
- (2) Illegitimate son's illegitimate son.

It is, however, difficult to understand in any view how ownership of the above persons is the same as that of the legitimate grandsons. The illegitimate son has no right during his putative father's lifetime over the latter's ancestral and self-acquired property. Much less, can he, have any right or ownership in the putative father's father's estate. Again, it is difficult to conceive how illegitimate son's illegitimate sons should have rights and not illegitimate son's legitimate son. Probably Viswesvara Bhatta may have meant here to refer only to the rights of the illegitimate son, considered as the grandson of the putative father's father, and to say that his rights have to be worked out in the same way as those of the legitimate grandson. He does not say how it is to be worked out. Probably it is in the language of Mr. Mayne one of those ideas cast out by the author more from his own consciousness than from a consciousness of a pre-existing right or custom, which ideas moreover will not bear any further examination.

If the succession has to be traced to the illegitimate son, then the general rules of the Mitakshara defining the heirs to the separate property of a deceased person must apply. The Mitakshara does not mention any other rules of succession to his estate. It would, therefore, seem that the putative father, the legitimate brother, &c., will be entitled to succeed as heirs to his property. The putative father can succeed to him in the absence of his leaving no issue, widow or daughter or daughter's son. In the absence of the putative father, his son (by a wedded wife), i. e., the legitimate brother, may be entitled to take¹. It is said by some recent writers that the rule of mutuality must apply in the case of succession to *sapindas*. Even if this rule is correct as warranted by the principles of the Mitakshara, the above case must be taken as an exception to that rule.

II.—*Illegitimate son's legitimate son's rights.*

The question that has to be considered is whether the principle of representation, *jus representationis*, applies to the case of the legitimate son of an illegitimate son. If the illegitimate son should predecease his father, are the issue of such illegitimate son entitled to take the share which their father would have taken had he been

1. See, however, West & Buhler, p. 83, where it is said that *inter se*, the sons of the same concubine must be regarded as brothers of the whole blood.

alive? In favor of the view that the legitimate son of the illegitimate son is so entitled, it may be said :—

First :—That the Mitakshara treats of his rights under unobstructed heritage, though as a special rule.

Secondly :—That the peculiarity of unobstructed heritage is that the persons succeeding thereto have the right of representation.

Thirdly :—That among Sudras the illegitimate son is more or less regarded in the same light as a legitimate son, and that, therefore, the sons and grandsons of such illegitimate son should claim the right of representation undoubtedly possessed by the sons and grandsons of the legitimate son.

Fourthly :—That in the text of the Mitakshara which entitles the illegitimate son to share with a legitimate son (*viz.*, “after [the demise of] the father, if there be sons of a wedded wife, let these allow the son of the female slave to participate for half a share: that is, let them give him half [as much as is the amount of one brother’s] allotment.” Mit. ch. I, sec. 12, pl. 2), the legitimate son’s son and son’s grandson are included in the term ‘sons of a wedded wife’ and that, therefore, by parity of reasoning ‘the son of the female slave’ ought to include the son and grandson of the illegitimate son.

Messrs. West and Buhler¹ in their work on Hindu Law say that for the 1st and 2nd of the reasons given above, the illegitimate son’s son will be entitled to take the share which his father (the illegitimate son) would have taken had he been alive. Dr. Jolly² also holds the same view.

This view has received judicial recognition in the case of *Ramalinga Muppan v. Pavadai Gotundan*,³ The last of the reasons above stated is that stated by Mr. Justice *Bhashyam Aiyangar* in this case. The facts were these :—The plaintiff was the divided brother of the last male owner. The latter died leaving no legitimate issue but a legitimate son of his predeceased illegitimate son. The plaintiff claimed to succeed in preference to the legitimate son of the illegitimate son. The court consisting of *Benson and Bhashyam Aiyangar*, JJ., held that the plaintiff was not so entitled, that the illegitimate son would have succeeded in preference

1. Pp. 72, 82 and 83.

2. The Hindu Law of Partition, Inheritance and Adoption (Tagore Law Lectures—1883) pp. 185 and 186.

3. 11 M. L. J. 399; 1 L. R. 25 M. 519.

to the divided brother and that, therefore, the legitimate son of such illegitimate son would be entitled to take on the latter's death his place.

We have now to consider whether this view is correct. For this purpose we have to see what the reasons will be for holding the other view, *viz.*, that the illegitimate son's son is not entitled by representation to take his father's share. These are:—

First :—That the place in which the Mitakshara treats of the illegitimate son's rights ought to have no bearing—it being merely accidental.

Second .—That if anything is to be inferred from the place of treatment, the same inference must follow in the case of widow, daughter or daughter's son. But it can scarcely be denied that the widow, daughter, or daughter's son takes only an obstructed heritage.

Third .—That as the illegitimate son is clubbed together with others (*i.e.*, widow, &c.) who take but an obstructed heritage and shares with them, his succession must not be regarded as unobstructed heritage.

Fourth .—That though his rights are considered in the chapter on unobstructed heritage, yet they are only considered as exceptional rules.

Fifthly .—The recent decision of the Privy Council in the *Jagampet* case¹ is authority for the position that all persons succeed to self-acquired property take only an obstructed heritage (excepting perhaps the sons). The illegitimate son has no right by birth over his father's ancestral property, much less in his self-acquired property. He gets only a share by the father's choice (Mit. ch. I, sec. XII. pl.) He cannot, therefore, take such properties as an unobstructed heritage. *A fortiori*, the son of such illegitimate son can have no rights in the grandfather's estate. Therefore, the right of representation does not extend to the issue of illegitimate sons unless specially given.

Sixthly .—The rights of the illegitimate son of a person of one of the three superior classes and of a person of the Sūdra class are both expressly considered in the Mitakshara in the same place. The Mitakshara gives to the former no rights of inheritance but rights of maintenance, while to the latter it gives rights of inheritance. The decision of the Privy Council in *Roshan Singh v. Balwant*

1. 12 M. L. J. 299.

Singh,¹ is to the effect that the right of maintenance awarded to the illegitimate son of a person of one of the three superior classes is only a personal right and does not extend to the case of the illegitimate son's legitimate son.

That this question was argued would appear clearly from the argument of Mr. Rattigan at p. 53 of 27 Indian appeals. It is also clear that their Lordships meant to decide it. "The more general question of law raised by the plaintiff relates to the position of the offspring of an illegitimate son." They say the obvious meaning of the passage is that the right of maintenance is confined to the illegitimate sons. It was distinctly suggested that illegitimate sons there included the offspring also and it was as distinctly negatived that it was not so and that was why it became unnecessary to decide, whether such right to claim maintenance, if it existed, was an interest in property within the meaning of S. 91, Transfer of Property Act. In other words, the decision is that the illegitimate son's son is not within the purview of the Mitakshara, chapter I, sec. XII, para. 3. It would follow that he is equally not within the purview of chapter I, sec. XII, para. 2.

Seventhly :—The words "son begotten by a man of a regenerate tribe on a female slave," and the words "son begotten by a Sudra on a female slave (corresponding to the Sanskrit *jātapi dāsyām sūdreṇa* and *dāsyām utpannāḥ putrāḥ*) naturally suggest that they have no application to the illegitimate son's son and are restricted to the illegitimate son.

No authority is wanted for this obvious construction and if any is wanted it is supplied by the decision in *Roshan Singh*.¹ No inference can be drawn from the fact that in the same text sons of a wedded wife (*Parinitaputrah*) include grandsons and great-grandsons. Moreover it is not by force of the construction of the words "sons of a wedded wife," that grandsons and great-grandsons are held to come within the words but by reason of the rule stated previously that grandsons and great-grandsons take by right of representation.

Eighthly :—Great-grandsons occupy the position they now have obtained only gradually. There was a time in the early Hindu Law when it was doubtful whether a great-grandson would take at all, and even the Mitakshara does not refer to the great-

1. I. L. R. 22 A. 191; L. R. 27 I. A. 51.

grandson expressly as a sharer of the heritage (see *Sarvadhikari*, pp. 561 and 562).

We should have said that the authority of the Privy Council in *Roshan Singh v. Balwant Singh*,¹ is conclusive on the question, but for the fact that Visveswara Bhatta in his *Madana Parijata*, which is regarded as of some authority in the Benares School of Law, in treating of "the share of the grandson in the grandfather's property," says that the grandson begotten by a Sudra upon a female slave has also rights. The passage referred to has already been stated and it is this: "The ownership of the grandson begotten by a Sudra upon a female slave is the same." We have already stated our reasons for saying that it does not refer to the illegitimate son's legitimate son. It may be said that if the illegitimate son's illegitimate son were to have rights, the illegitimate son's legitimate sons must undoubtedly have rights. But we have already stated that the more correct view is that the passage only includes the son's illegitimate son. Any how it is a pity that neither the above passage of the *Madana Parijata* nor the case of *Roshan Singh v. Balwant Singh*,¹ should have been cited before their Lordships in the case of *Ramalinga Muppanv. Pavadai Goundan*². It may be that the passage of *Madana Parijata* has some bearing but notwithstanding this passage we should think that the decision of the Privy Council in *Roshan Singh v. Balwant Singh*¹ concludes the question and negatives the rights of the illegitimate son's son, unless their Lordships of the Judicial Committee are themselves disposed to limit the effect of their ruling. The *Jagampet case*³ adds to the difficulty and takes away the force of the remarks of Messrs. West and Buhler⁴.

P. R. G.

HINDU AND MAHOMEDAN RELIGIOUS ENDOWMENTS

V.—Customary Right cases.

We shall now advert to a class of cases known as the customary right cases and discuss the principles upon which such rights have been recognised. If the whole land is given for the religious establishment or institution, the whole constitutes a religious endowment and if, as a matter of fact, the land is described as yielding a certain amount of income and the land so described

1. I. L. R. 22 A. 191. 2. 11 M. L. J. 399; I. L. R. 25 M. 61. 3. 12 M. L. J. 299.

4. The recent case of *Fukirappa v. Fukirappa* Bom. L. R., 809 is a case in which the illegitimate son had a vested interest and his son was, therefore, held entitled to take such vested interest.

is constituted as the religious endowment, the fact that the lands yield more income in course of time, and the fact that the donor did not take this into account do not constitute the surplus as private property. The endowment is still the entire land yielding the larger income and not simply that portion of the land yielding so much income as was mentioned at the date of grant. *Jagatmoni Chowdrani v. Ramjani Bibee*¹.

On the other hand the land may not have been constituted as an endowment. The donor might have granted the right to enter upon his land to others and do certain things, as, for instance, to burn the *Holi*, to place the *tazia*, or to bury the dead. In all these cases the land is not constituted as an endowment, but the public or others interested have the right to do certain things and nothing more. Where no specific grant can be proved, but the public or others interested are using for a long period of time the land for a certain purpose, it may be on specific occasions, or are for a considerable period exercising the right which they claim, *viz.*, of burning the *Holi* or placing the *tazia*, &c., then either a lost grant may be inferred to do those things or a customary right may be said to have been established. They are not, strictly speaking, cases of easements. In such cases the only right which a person has is that he is not to be interfered in the enjoyment of the right, and he has no cause of complaint where others use the land for other purposes, provided such user does not invade or obstruct the enjoyment of his limited right.

These questions arise very frequently in connection with the bathing ghats near the sacred rivers. Thus in *Jaggamoni Dasi v. Nilmoni Ghosal*², the plaintiff's father built a temple, a bathing ghat and a room called Gangajathri Ghar. The room and the ghat were the property of plaintiff's father, and it was usual that persons on the point of death should be removed to this ghat and certain ceremonies performed. The Calcutta High Court held that the question which had to be considered in such cases was, whether the plaintiff's father when he erected the room and the ghat intended to grant to the Hindu community merely a right of easement over this property, *i. e.*, a mere right of passage, so that the ownership of the soil still remained in him or intended to transfer the ownership in the ghat and the soil to the Hindu community.

1. I. L. B., 10 C. 533.

2. I. L. B., 9 C. 75.

The test for finding out such intention is to see whether a trustee or shebait has been appointed. If one had been appointed, then the reasonable presumption might be that the ownership was transferred to such trustee or shebait. But if no trustee or shebait had been appointed, then it would be reasonable to suppose that the ownership of the soil continued in the owner.

In *Jaggamoni v. Nilmony*¹ the defendant was using the ghat and room as a place for landing goods. This was held to be an obstruction of the plaintiff's right on the assumption or finding that as the ownership of the soil had vested in the plaintiff, the defendant's act would be wrongful and would constitute an interference of his right of ownership. If there was a complete dedication, then the user of the Hindu community for any other purpose than that intended by the donor is clearly not warranted, and the representative of the donor will have the undoubted right to maintain a suit which has for its object not to resume the grant but to effectuate the grantor's intention by preserving the property to the uses for which he presumably granted it.

The nature of the right enjoyed by the general public or a limited portion thereof in the absence of a grant is well discussed in the case of *Ashraf Ali v. Jagan Nath*². The inhabitants of a certain village were using a plot of land in the said village for the purpose of burning the holi and celebrating the ceremonies incident thereto at the time of the Holi festival. Adjacent to this was a house which came to be owned by a Mahomedan. The latter for the first time caused a tazia to be placed on the land. The plaintiffs, the inhabitants of the village, sued for restraining the defendant from interfering with their right.

As regards the nature of the right, the High Court held that the plaintiff had no proprietary interest in the land, that the claim they asserted was not an easement, for there was no dominant heritage for the servitude to attach, and that the right claimed was a customary right. As regards the alleged infringement the High Court held that the right of the inhabitants was to burn the Holi only on certain days, that they had no right on other days, that the placing of the tazia by the defendant at other times could not interfere with plaintiff's rights, and that as it was not proved that the defendant's act desecrated the place the plaintiffs had no cause of action.

1. I. L. B., 9 C. 75.

2. I. L. B., 6 A. 497.

The right claimed is not an easement. *Kuar Sen v. Mamman*¹, *Mohidin v. Shivalingappa*² and *The Municipal Board of Cawnpore v. Lallu*³. The claim in such cases is not based on any allegation of right in the soil of the land in question or in any other soil to which their user of the ghat was appurtenant. Nor is this right a customary easement within the meaning of S. 18 of the Easements Act, for the latter section implies some right of ownership or occupation or habitation of some particular place. See *The Municipal Board of Cawnpore v. Lallu*³. It is a customary right or a right by custom which is preserved by S. 2 of the Easements Act. *Mohidin v. Shivalingappa*².

Cases of dedication of highway also stand on the same footing. Thus in the case of *St. Mary Newington v. Jacobs*,⁴ it was held that the owner who dedicates a portion of his land to the public as a highway parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation made to and adopted by the public, of one part of the street to one kind of passage and another part to another, does not deprive him at common law of any right as owner of the land which are not inconsistent with the right of passage by the public.

The case of *Lade v. Shephard*⁵, also proceeds the same principle. In this case the owner of land who had built a street upon it and dedicated the street to the public, was nevertheless held entitled to maintain an action of trespass against the owner of the adjoining land who laid a bridge over the ditch, the end whereof rested on the highway.

The principle of these decisions is that the property of the soil and the freehold in a highway is in the owner or the representative the dedicating owner, subject to an easement or right of passage for the benefit of the public, so that if the street or highway is used for any other purpose than the one for which it is dedicated, the owner has a right to interdict such use. See also *Dovaston v. Payne*⁶ and *Harrison v. Duke of Rutland*⁷.

In cases of dedication of highways there must be an intention to dedicate of which the user by the public is evidence and no more. *Poole v. Huskinson*,⁸ *Rea v. Lloyd*,⁹ *Rugby Charity v.*

1. I. L. R., 17 A. 87.

2. I. L. R., 23 B. 666.

3. I. L. R., 20 A. 200.

4. L. R., 7 Q. B. 47.

5. 2 Str. 1004.

6. 2 Sm. L. C. 157.

7. (1893) 1 Q. B. 142.

8. 11 M. & W. 827.

9. 10 E. R. 674.

*Merryweather*¹. So also where some rights of user are claimed by a community in the soil of another, in the absence of express grant, the principle upon which such rights are upheld is that there is an intention by the owner to dedicate his land for the purposes claimed of which the user by the public or the community concerned is evidence and no more.

There seems, however, to be a distinction in English Law which may well not apply to India. Thus in *Poole v. Huskinson*², it was observed by *Parke, B.* that though there might be a dedication to the public for a limited purpose, as for a footway, horseway or driftway, there could not be a dedication to a limited part of the public (as to a parish). See also *Bermondsey Vestry v. Brown*³, and *Stafford v. Coyney*⁴.

It is difficult, however, to appreciate the distinction or limitation suggested. It is not easy to understand why there can be no dedication to a limited part of the public. Probably it ought not to be called a highway. But there can be no reason to suppose that when such a dedication is made the persons for whom it is intended should have no right altogether. On the other hand, the observations of *Heath, J.*, in *Woodyer v. Hadden*⁵, are very pertinent. Citing from *Hawkins' Pleas of the Crown*, Book 1, C. 76, S. 1, he says, "A way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, and which terminates there and is for the benefit of the particular inhabitants of such parish, house or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects, but only to some particular persons, and each of which, as it seems, may have an action on the case for a nuisance therein," and adds "the authorities he cites are exactly in point."

However this may be, it is clear that in India there is no such limitation. Rights are claimed by the Hindu community or a part of them, and from the very nature of such rights others, such as Mahommedans or even other sections of the Hindu community, cannot exercise such rights. The burning of the Holi or doing any other act in the exercise of a person's religious avocation is one peculiarly personal to the members of a certain religious profession. So the placing of the tazia has relation only to the Mahommedans and not to the Hindus.

1. 10 R. R. 528.

2. 11 M. & W. 827.

3. L. R., 1 Eq. 204.

4. 7 B., & C. 257.

5. 14 R. R., 706.

Customs are either public or general. A public custom is one which applies to the whole community, *i.e.*, to all the members of a given State. A general custom is one which is common not to all the members of a State but to a considerable class of persons. We are only concerned with general customs. They are either (a) local or (b) caste or class customs.

As regards the evidence required to prove a custom it may be said that a local custom is, as a general rule, proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla, or village or at the particular place in respect of the persons and things, which it concerns. Upon the same point the Bombay High Court in *Mohidin v. Shivalingappa*,¹ observed: "Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done which have been assented and submitted to, as leads to the conclusion that the usage has, by agreement or otherwise, become the local law of the place in respect of the person or things which it concerns."

The custom need not be shewn to have been immemorial, and in India the English rule that the user should be beyond the time of legal memory is not followed. *Kuar Sen v. Mamman*². No fixed period of enjoyment is necessary to prove a valid customary right. See *Palaniandi Tevan v. Puthirangonda Nudan*³.

Customs to have the effect of excluding or limiting the operation of general rules of law must be certain and reasonable.

As regards the requisite of certainty, the circumstances of each case must be looked to and courts must not be too easily led to hold that a custom is bad because the parties have failed in their pleadings to define it with accuracy. As observed by the Bombay High Court in *Mohidin v. Shivalingappa*¹, "Looking to the nature and origin of such customs, it would be unreasonable to expect any precise certainty as to what should be (*Hull v. Nottingham*⁴) enjoyed as a matter of right. If at the present time the inhabitants all meet

1. I. L. R., 28 B. 666.

2. I. L. R., 17 A. 87.

3. I. L. R., 20 M. 389.

4. 1 Ex. D. 1.

to discuss and determine such a matter; it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have."

As regards the test of reasonableness, the Bombay High Court in the same case observed: "Amongst all races that bury their dead, this right of burial in a particular locality is one that is most clearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are multiplied exceedingly, the contingency seems too distant to justify the courts in summarily putting an end to the right.....If a custom which allows all lawful games to be played on another person's land at all times of the year is not (*Hull v. Nottingham*¹) an unreasonable custom, it seems impossible to hold that the limited custom established by these defendants is bad."

A custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. The mere possibility that after many years the number of tombs may have increased to such an extent as to deprive the owner of the use of his field is too remote to describe the custom (*viz.*, burying the dead near a *durga*) as unreasonable.

In the case of *profits a prendre* it would seem that no right could be acquired if the enjoyment would have the effect of consuming and not leaving anything to the owner of the land, (See *Lord Rivers v. Adams*², Clerk and Lindsell, 284, and section 18 of the Easements Act), and that a right to *profit a prendre* cannot extend to the dwellers in a parish or manor as distinguished from the inhabitants of a parish. *Allgood v. Gibson*³, and *Fitch v. Rawling*⁴.

It is impossible within the limits of this article to discuss the several requisites of the custom and the cases dealing with the matter. It is enough to say that in all cases of this class where a custom excluding the operation of a general rule (*viz.*, that the proprietor or other person lawfully in possession whose rights are not controlled by statute law, grant, or contract, has an exclusive right to the use of his land for all purposes is alleged, it is necessary that those setting up such a custom, should be put to strict proof thereof, and a court cannot decide that it exists unless such

1. 1 Ex. D. 1.
2. 3 Ex. D. 361.

3. 34 L. T. 883.
4. 3 E. R. 425.

court is satisfied of its reasonableness, its certainty as to its extent and application, and is further satisfied that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as to suggest that, originally by agreement, or otherwise, the usage has become a customary law of the place in respect of the persons and things with which it concerned. *Kuar Sen v. Mamman*¹.

The nature of these customary rights is often compared to a class of customary rights noted in the English cases of which *Mounsey v. Ismay*² is the leading instance. Such rights were held not to be easements within the meaning of the English Prescription Act (Lord Tenderden's Act 2 and 3 Will. IV. Ch. 71, S. 2.)

In the report of that case in 32 L. J. 94 it was held that a custom for all the freemen and citizens of a neighbouring city (Carlisle) to hold horse races over the close of the plaintiff (Mounsey) in the hamlet of Kingsmoor on Ascension day every year was good, and that in pleading such custom which was claimed for a day certain, it was not necessary to allege that the day was a reasonable day.

In the report of the same case in 34 Law Journal 352, it was held that such a right was not an easement within the meaning of the Prescription Act. The Court observed: "To bring the right within the term 'easement' in the 2nd section, it must be one analogous to that of a right of way which precedes it and a right of water-course which follows it, and must be a right of utility and benefit and not one of mere recreation and amusement. It was never within the contemplation of Lord Tenderden to include within the Act such customary rights as entering land to enjoy rural sports as in *Millichamp v. Johnson*³ or to dance upon a green as in *Abbot v. Weekly*⁴, by analogy to which we held this alleged customary right to run horse races a lawful one at common law. See *Mounsey v. Ismay*². What we think he contemplated were incorporeal rights incident and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure."

This of course does not cover all the customary rights upheld in the Indian Courts, for in many cases the customary rights are enjoyed by people in respect of their religious avocations. The right

1. I. L. R., 17 A. 87.

2. 32 L. J. (Ex. N. S.) 94; 34 L. J. (Ex. N. S.) 35 2.

3. Willes 206 n.

4. Levinz 176.

to place the tazia in the case of Muhammadans or the right to bathe in the bathing ghats of the sacred rivers is not a custom for mere pleasure; though the right to burn holi may perhaps be regarded as a custom for mere pleasure. But there can be no doubt that all such customs are valid and are not within the scope of the Easements Act, there being no dominant heritage for the servitude to attach.

In the case of customary rights in which several persons as belonging to a class (sect) or community are interested, it has been held that it is not competent for a single person to assert an exclusive right, *i. e.*, a right as against the rest of the public or community.

Thus in the case of *the Municipal Board of Cawnpore v. Lallu*¹, the two plaintiffs, Gangaputras, sued for a declaration of their exclusive right to gift whenever they pleased at their old customary seats at certain spots at the Sarsayya Ghat on the bank of the Ganges in Cawnpore and to attend to their Jajmans at the time of bathing and other religious ceremonies and to receive their dues and presents &c., as usual. Their complaint was that the Municipality was arranging seats to be occupied by the Gangaputras of such places as they thought proper and that this was an illegal interference of their right. The Allahabad High Court held that though there has been at some remote time a dedication of the ghat to the use of pilgrims desiring to perform their spiritual ablutions in the Sacred River and for the proper performance of those ablutions, the services of Gangaputras would be required, yet the latter could not assert an exclusive right or a right as against the public, and that unless the Gangaputras could show a right to the soil of the ghat or any portion thereof, they cannot in law maintain a claim to the exclusive use of the ghat for the purpose of collecting alms or fees to the exclusion of other persons.

In order that such exclusive right may be established, it was held in some of the cases that the plaintiff asserting such exclusive right must allege some right to the soil of the ghat or any portion thereof (see *Husain Ali v. Matukman*;² and *The Municipal Board of Cawnpore v. Lallu*¹). The principle seems to be, as in cases of dedication, that the mere use in enjoyment of a right in common with others will not be an adverse user by the one as against the others. *Reg v. Johnson*³ and *Turner v. Ringwood Highway Board*⁴.

1. I. L. R., 20 A. 200.

2. I. L. R., 6 A. 32.

3. 1 F. and F. 657.

4. L. R., 9 Eq. 418.

But it is not easy to see why a right in the soil or ghat should be established. That may no doubt be one instance in which an exclusive right may be set up. It may also be that one of a number of persons cannot gain by prescription an adverse title by mere user as against the rest of the community. But use in the way indicated may be proper evidence of a prior dedication, *i. e.*, that at the time when the dedication was to the public or to the class, the person dedicating clothed a certain person with a higher right and there can be no doubt that the person dedicating is competent to annex any conditions at the time of dedication. *Mercer v. Woodgate*,¹ *Morant v. Chamberlain*,² *Fisher v. Prowse*³ and *Gossami Sri Giridhariji v. Roman Lalji Gossami*.⁴ But in order that there may be a cause of action, the suit must be against persons actually interfering with the right. Where, therefore, there was a ghat known as *Pushto jha* at the Ganges and there was attached to it a *Sangat* and the plaintiff, the Mahant and manager of the *Sangat*, finding that some Mohamedans came to bathe and desecrated the ghat brought a suit for injunction against 58 Mohamedans without alleging that they in any way interfered with the right of the plaintiff and the other Hindus, it was held in *Shah Muhammad v. Kashi Das*,⁵ that such a suit was not sustainable and that there can be no injunction against the whole world.

In the case of certain customary payments to a temple it must be remembered that persons accustomed to worship in the temple would ordinarily continue a payment as an act of piety and, therefore, *prima facie* such contributions are voluntary. The question in all such cases is whether a legal origin is to be assigned to the claim on behalf of the temple or institution or whether the payment is merely voluntary. If the payment is voluntary, the mere fact that the payments have been made for a long series of years does not convert the voluntary nature of the payment into one of legal right. *Ramasami v. Apparu*.⁶

A legal obligation to pay dues of this nature, as a customary payment to Mariamman temple in a village on occasions of marriage, would probably be held to exist in a case in which the evidence showed presumably that it had been customarily contributed from

1. L. B. 5 Q. B. 26.

2. 6 H and N. 541.

3. 2 B & S. 770.

4. I. L. B., 17 C. 3.

5. I. L. R. 7 A. 199.

6. I. L. R., 12 M. 9.

time immemorial by the community residing within a village for the enjoyment of the benefits attached to the right of worshipping in the temple and attendance at its ceremonials and the services rendered to them by the managers and other officers of the temple. In such a case there would be a consideration of advantage to which to ascribe the origin and continuance of the custom, sufficient probably to make it valid and binding. *Maadan v. Erlandi*.¹

In all such cases judgments obtained by trustees &c., against others affirming the right would be relevant under S. 13 as being evidence of instances in which the right claimed had been asserted or under S. 42 of the Evidence Act as relating to matters of a public nature. *Ramasami v. Appavu*.²

We shall have to consider later on the question whether several persons possessing in common, these customary rights may sue under S. 30 C. P. C. or may sue individually for their own right.

NOTES OF INDIAN CASES.

Sankara Narayana Vathiyar v. Sankara Narayana Aiyar :—

I. L. R., 25 M. 343.—The Madras High Court has always gone in for the view that the contract rate of interest provided from date of default should be enforced however exorbitant, apart from any question of inequality in the contracting parties. This has been reiterated in the present case.

Another question of interest as regards the construction of section 1 of Act VI. of 1899 is touched upon by the Chief Justice though it didn't actually arise for decision. We are unable to agree with the interpretation placed upon the section by his Lordship. First, the Act applies to every contract in respect of which any suit is instituted after the commencement of the Act. This means that if the suit was instituted before the commencement of the Act, it would not apply. Secondly, the section says that the Act applies to every contract which is put in issue in any suit after the commencement of the Act. The Chief Justice would introduce the word 'instituted' after the word 'suit'. Clearly there is no warrant for this. Again the Chief Justice says 'put in issue in any suit' means also 'put in issue in any appeal.' We cannot accept this

1. 5 M. H. C. R. 147.

2. I. L. R., 12 M. 9.

either. The section means that the Act shall not apply to any contract which is put in issue in any suit before the commencement of the Act. Thus it is clear that, although the contract may be put in issue in the appeal after the commencement of the Act, still if it has been put in issue in the suit before the commencement of the Act, the Act shall not apply. It seems to us that the legislature has deliberately omitted the word 'instituted' after the word 'suit'. Take a case where a suit was instituted before the Act, but after the Act had come into force the defendant pleaded a set-off of a sum of money claimed under a contract falling within the scope of section 4. Here although the suit was instituted before the Act, the contract is put in issue after the Act, and the Act, therefore, is clearly intended to apply. According to the Chief Justice, it would not.

Akkanna v. Venkayya, I. L. R., 25 M. 351.—A Hindu widow out of the income of property which she inherited from her husband acquired a mortgage right. The question was whether an assignee from her during her life-time was entitled to the unexpired portion of the mortgage on her death or her husband's reversionary heirs. The answer was that the title of the assignee was good. The conclusion is, perhaps, not easily reconcilable with the observations of the Privy Council in *Babu Sheo Lochun Singh v. Babu Sahab Singh*¹. We think, however, that the sounder view is that enunciated by Mr. Justice Bhashyam Aiyangar. There is no general presumption that the undisposed-of residue of the income is intended to be made part of the husband's estate. A Judge, less strong, might easily have been led into the error of supposing that the observations of the Privy Council already referred to, amounted to an absolute pronouncement on the law.

Raja Mannar v. Venkatakrishnayya, I. L. R., 25 M. 361.—We are unable to agree with Davies and Moore, JJ., in their view that the direction in the will to pay the sum of money to the testator's brother which the latter had kept with the testator, was a legacy and not an order to the executor to pay a debt due by the testator. There is nothing to support the view that it was a legacy in discharge of a debt. The amount of money directed to be paid was the amount of the debt. The absence of a provision for interest is of no consequence.

1. L. R. 14 I. A. 68.

Kanthu Punja v. Vittamma, I. L. R., 25 M. 385.—The case appears to us to illustrate an extreme application of the principle of the Privy Council decision in *Jogeswar v. Ram Chand*¹. Section 45 of the Contract Act merely decides the right to performance as between the debtor and the joint obligees. As between the obligees themselves *inter se*, the right would depend upon the question whether it was a joint right with survivorship or the interests of the obligees were several. The observations of the Privy Council against joint tenancy among Hindus seem opposed to the decision of the same tribunal in *Narpat v. Mahomed Ali*.² The question of joint right passing by survivorship on the death of one to the other or of several rights descending to the representative would seem to depend upon the circumstances of each case, rather than upon the language of the instrument executed by the debtor.

Sivasamy Chetty. v. Sevugan Chetty, I. L. R., 25 M. 389.—This decision lays down an important principle as to the operation of instruments intended to be executed by several but only executed by some, even as regards the executants themselves. The question is, did each man intend to oblige himself irrespective of others, or was the obligation of each conditional upon the incurring of a like obligation by the others. If a particular case falls under the latter head, there is no doubt that the instrument is not operative against any. If the case falls under the former head, the executants are bound. The dividing line is not, perhaps, easy to draw; but there is no doubt that the difference of intention does exist. The difficulty, no doubt, consists in the application of the rule.

Muthayya Rajagopala Thevar v. Minakshi Sundara Nachiar, I. L. R., 25 M. 394.—This case opens up for discussion an interesting question which requires considerable investigation before a satisfactory answer can be given. We have nothing to say against the decision itself. Questions of succession are troublesome enough without their being complicated by considerations of propinquity through more than one line of connection. Suppose one is related as a Bandhu to the *propositus* through his mother and another of equal grade also through his mother. Suppose the latter is more distantly related through his father also as a Bandhu. Is the latter then to be preferred on account of the double line of connection? There must be something to be said in favour of this in the theory of community

1. I. L. R. 23 L. A. 37

2. I. L. R., 11 O. 1.

of particles of the same body. The acceptance of this view would introduce far too many complications in the law of inheritance. But this is very far from saying that the natural father of the adopted son has no right of inheritance at all to the son given in the natural family under any circumstances. The texts of the early sages are, perhaps, in favour of the extinguishment of all rights of the adopted son in the natural family. Vide chapter IX, sloka 154 of *Manu*. But the more modern Hindu commentators are not averse to the recognition of some residuum of right in the adopted son in the natural family and *vice versa* in the members of the natural family in relation to the adopted son. The question is, however, beset with difficulty and deserves careful examination.

Punithavelu Mudaliyar v. Bhashyam Aiyangar, I. L. R., 25 M. 406.—This is an interesting case. There was a mortgage by a debtor of his stock-in-trade and book-debts, present and future. This was rightly held to operate upon future goods and debts. The Chief Justice and Bhashyam Aiyangar J. have differed as regards the question whether doctrine of reputed ownership applies to the case of a chargeholder. We are inclined to agree with the view of the latter that a charge holder is within the rule. Bhashyam Aiyangar J. has also decided in accordance with English precedents that debts due to the insolvent are taken out of the order and disposition of the insolvent by notice to the insolvent's debtor or by suit against the insolvent. Another proposition laid down in the case is that the doctrine of *lis pendens* has no application to moveables. And even if it did, the Official Assignee who is a transferee *in invitum* is not affected by a decree against the insolvent in a suit to which the assignee was not made a party.

Subba Naidu v. Nagayya, I. L. R., 25 M. 407.—The Court was unable to understand this decision. We do not see any distinction between a personal Inam and a service Inam as regards the right of the reversioner.

Janardhan v. Ramachandra, I. L. R., 25 M. 408.—The Court would consider that it was not the duty of the Courts of Justice to interfere with the Subordinate Judge's decision.

power to bring the appellant's representative on the record and to hear the case again. The High Court, of course, set aside his order and directed him to rehear the case after entering the representative's name on the record. As pointed out by Lord Justice *Bowen* in *Duke v. Davis* when either the appellant or the respondent dies, the appeal itself dies though in the interests of speedy administration of justice the law provides it may be revived at the instance of the representative of the deceased appellant and when it is the respondent that is dead the law for the same reason compels the appellant to revive the appeal against the respondent's representative and in case he fails to do so deprives him of the right to a fresh litigation against him.

Husen Bhoj v. Ahmed Bhoj, I. L. R. 26 B. 319. It is to be regretted that latterly the construction put upon the expression substantial question of law in section 596 relating to appeals to the Privy Council has departed from the earlier construction adopted by the Calcutta High Court. It was held and we think with good reason, substantial question meant a question affecting the substance of the case that is, not a mere question of procedure which would not affect the final decision of the case on the merits but one which would affect the merits. See *In the Goods of Premchand Munshi*.² That is the sense in which the word is used in section 584, clause c where a substantial error is spoken of. *Lakshinarrain v. Jadu Nath*.³

But recently it has been held that a substantial question means a question on which there is room for reasonable doubt as to the correct conclusion to be arrived at, in other words, a doubtful question. It would appear notwithstanding, that this is not the correct view. It is difficult to fail to see that etymologically there is any room for doubt. It would appear notwithstanding, that this is not the correct view. Chief Justice *Jenkins* uses the word in the

Basad Singh, I. L. R. 24 A. 174:—A question as regards appeals to the Privy Council. Though there is no pronouncement on the subject matter of the suit, is it a money claim? Does it involve the amount

interest claimed up to the date of appeal, it exceeds 10,000. In both the above cases, the problem is whether the interest, which is in the discretion of the Court, subsequent to the institution of the suit, forms part of the subject-matter of the suit. There is no answer in the judgment to this question. If interest is added at one rate, the subject-matter may exceed 10,000, at another it may not. We think, however, that if according to the rate at which it is claimed the amount of interest calculated will carry the claim in the suit and the value of the matter in dispute in appeal up to 10,000, the case will satisfy the requirements of S. 596.

SUMMARY OF RECENT CASES.

Wise v. Dunning [1902], 1 K. B. 167.

Recognizance to be of good behaviour—Public meeting—Insulting language—Apprehension of breach of peace.

In order that a person may be bound over to keep the peace, it is not necessary to show that he intended to act unlawfully or to induce anybody else to act unlawfully; it is enough that he did an act which, though not unlawful in itself, might in all reasonable probability lead another to act unlawfully.

At public meetings held in Liverpool, a Protestant lecturer used language grossly insulting to the religion of the Roman Catholics of whom there was a large body in the town. This language caused breach of the peace, and he threatened to hold similar meetings and use the same blasphemous language again. Hearing that his opponents proposed to bring sticks, he told his audience that he looked to them for protection and they proposed to bring sticks also.

Held on these facts that he was rightly called upon to furnish security for good behaviour.

Gordon v. London, City and Midland Bank, Ltd., Gordon v. Capital, and Counties Bank Ltd. [1902], 1 K. B. 242.

Banker—Cheque—Crossed Cheque—Customer—Agent for collection—Draft by one branch of a bank on another.

In a case where the clerk in the employ of the plaintiff stole a number of cheques belonging to the plaintiff, forged the plaintiff's endorsement to them and had the amounts collected by the defendant bank, and this action for conversion was brought against the bank, the following points were decided:—

(1). S. 82 of the Bills of Exchange Act, as well from its language as from the history of legislation on the subject, affords protection to bankers only in the case of crossed cheques, the duty of collecting which is imposed by law on bankers, and even that only when they collect it as agent for their customers. If the banker credits the customer with the amount of the cheque before clearing it and allows him to draw upon it, the subsequent clearance is not done as agent for the customer but for their own benefit, and in such cases S. 82 will not avail to protect the banker. Vide *Matthiessen v. London and County Bank*,¹ *G. W. Ry. Co v. London and County Banking Co.*²

(2). Moreover the reason for the protection does not exist in the case of cheques which are not crossed at the time when they come into the banker's hands. Therefore a banker cannot cross them himself after they come into his hands and then evoke the protection afforded by S. 82.

(3). A draft by one branch of a bank upon another is not a cheque within the meaning of the Bills of Exchange Act.

(4). The fact that a crossed cheque is marked 'not negotiable' does not *ipso facto* take the case out of S. 82.

(5). Crossed cheques drawn upon one branch of a bank and payable to the plaintiff were stolen and presented by his clerk with forged endorsements in another branch of a bank in which the clerk himself had an account. The branch collected the amount from the other branch by means of debits and credits at the Head Office and placed it to the credit of the clerk, *bona fide* without any knowledge of the theft of the cheques. In these circumstances it was held that the bank was protected either by S. 60 or by S. 78 of the Act.

[As regards the Indian Law, it will be the same as regards points 1 and 2. S. 131 of the Indian Act being word for word substantially the same as S. 82 of the English Act. Point 3 will also be similarly decided. S. 5, paras 1 and 6 of the Indian Act, corresponds respectively to S. 3, sub-section 1 and S. 73. As regards point 4 there is specific provision in the Indian Act. Section 130 says that a person taking a crossed cheque marked 'not negotiable' shall not have and shall not be capable of giving a

1. 5 C. P. D. 7.

2. [1901] A. C. 414.

better title. A question may arise whether cases under S. 130 are outside the scope of S. 131. As regards point 5, the Indian Law will also be the same. Only there is no corresponding provision to S. 60 of the English Act in the Indian Act. S. 128 of the latter Act, however, comes very nearly to the mark and will cover the case. S. 79 of the English Act corresponds to Ss. 127 and 129 of the Indian Act. S. 129 will also cover point decided herein:—[Ed].

Blackburn v. Liverpool, Brazil and River Plate Navigation Company [1902], 1 K. B. 290.

Ship—Bill of lading—Exceptions—Perils of sea occasioned by negligence—Mistake of engineer.

Owing to the mistake of the engineer of a ship, one valve instead of another was opened and water was let into a tank where goods had been stored; and the goods were damaged. In an action by the owner for damages, the question was whether the owners of the ship were exonerated from liability by reason of the Bill of Lading containing the provision that they should not be held liable for losses caused by *perils of the seas or navigation*, whether arising from the negligence, default or error in judgment of the engineer or otherwise howsoever. *Held*, that the loss was caused by a peril of the sea within the exception and that the defendants were not liable.

Sealy v. Tandy [1902], 1 K. B. 296.

Licensing Acts—Public house—Inn—Right of licensee to request person to leave premises.

An inn is bound to accommodate all travellers but not those who are not travellers. A public house, which is not an inn, is not bound to accommodate anybody whether a traveller or otherwise.

A magistrate having dismissed a summons for assault on the ground that the complainant who was a licensee of a public house attempted to eject the accused forcibly from the premises, and that he had no right to do so, the Court of the King's Bench reversed the order and sent the case back to the magistrate, observing that the public house was not an inn nor the accused a traveller, and that either ground would be sufficient to give the licensee a right to eject the accused from the premises.

In re Pitt-Rivers—Scott v. Pitt-Rivers [1902], 1 Ch. 403.

*Will—Absolute gift—Secret trust—Charity—Benefit of public—
No rights acquired.*

Where a testator established a museum and laid out a portion of his estate as a pleasure ground but reserved to himself his private rights without an actual dedication, though the museum was maintained for the benefit of the public, and by his will the testator devised and bequeathed the museum and pleasure grounds and an annuity for the maintenance of the same to his son and at the same time it was proved that the testator intended his son to maintain the museum and grounds and to allow the public access thereto as before and the son accepted the gift promising to fulfil the secret trust:—

Held (1), that no charitable trust had been created, and

(2), that the testator intended that the public should acquire no rights.

Hunt v. Luck [1902], 1 Ch. 429.

Constructive notice—Tenant in possession.

A tenant's occupation is notice of all his rights and not of his lessor's title or rights.

Actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights.

A purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property. He must make inquiries of the person in possession and find out from him what his rights are, and if he does not choose to do so, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession.

In re Bradshaw—Bradshaw v. Bradshaw [1902], 1 Ch. 436.

*Will—Power of appointment—General and special powers—
Election—Covenant to exercise a particular power.*

No one can take under and against the same instrument, but if he elects to take under it he is bound by all its provisions.

A case of election arises where the instrument disposes or purports to dispose of property which belongs by paramount title to the person claiming under it, and in such a case he cannot take under it the benefit which it gives him unless he is prepared to permit the gift which it purports to make of his own property.

A case of election also arises where a person purports under a power of appointment to give property which is the subject of the power to persons who are not subjects of the power, *i. e.*, in fact to exercise a power which he has not got and gives to the person who would be defeated by that gift free disposable property belonging to the testator.

This rule as to election does not proceed either upon an expressed intention or upon a conjecture of presumed intention, but proceeds on a rule founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

*Cooper v. Cooper*¹ followed.

In applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void, because it is in excess of the power and an appointment which is void as transgressing the rule against perpetuity. A general power of appointment is broadly distinguishable from property but in its practical results, and in what I may call its market value, it is really equivalent to property. The donee (of the power) may deal with it as he pleases.

When the power is a special one as in the case of a power of appointment amongst children and commonly given to parents and it is intended not to make a provision for the children, but it is a discretion vested in the parent for determining what the particular provision shall be. Such a special power is nearly akin to a trust and at all events it is a fiduciary power. The person having such special power should not bind himself to deal with it in any particular manner.

Where it is a special power to appoint by will the intention of the person creating such a power, whether by settlement or by will,

1. L. R., 7 H. L. 67.

is that the donee of the power shall keep the exercise of it under his control until the time of his death.

A covenant, therefore, to exercise a special testamentary power in a particular way is void though a man may validly release a power.

Though the Court will uphold family arrangements, the doctrine founded on them will not apply to covenants to exercise a special testamentary power in a particular way.

In re Howgate and Osborn's Contract [1902], 1 Ch. 451.

Written instrument—Material alteration—Purport and office of instrument.

A material alteration in a written instrument does and an immaterial alteration does not avoid it.

The rule was first laid down with reference to deeds conveying freehold property. But it is now established that it applies to all written instruments and is not confined to deeds of purchase and sale of land.

In considering whether an alteration is material or not, you must have regard to the particular instrument to see what its purport and office is.

*Suffell v. Bank of England*¹ referred to.

In re Fergusson's Will [1902], 1 Ch. 483.

Conflict of laws—Legatee—Foreign domicile—Next of kin—Foreign Law—Sister of the half-blood—Nephews and nieces—English Law.

According to the German Law a sister of the half-blood will be excluded by the nephews and nieces of the whole blood of the *propositus*. A bequest of personalty in the will of a domiciled Englishman to the "next of kin" of a legatee who is a foreigner means the nearest blood relations in the ascending and descending line according to the English Law subject of course to any question of status should it arise. According to the latter law those of the half-blood are equally entitled to take with those of the whole blood.

But in ascertaining who are the children of a legatee who is a foreigner, you have regard to the status of the parent, so that

1. 9 Q. B. D. 555.

ante nati made legitimate by the subsequent marriage of their parents, in countries where a subsequent marriage renders these children legitimate are recognised by the rules of international law as legitimate under English Law.

In re Selot's Trust [1902], 1 Ch. 488.

Conflict of Laws—Prodigal—French Law—Status—Conseil judiciaire—Fund in English Court—Payment.

Where the disability or disqualification arises from the principles or custom or positive law of a foreign country, especially of a foreign nature, it is not regarded by this court.

Affecting and modifying the status appears to be a very different thing from changing the status. The status is one indivisible whole. If you alter the status, you alter the whole.

*Worms v. De Valdor*¹ followed.

A French subject of full age and of extravagant habits adjudged by a competent French Court to be a 'prodigal' is restrained from dealing with, disposing of, alienating, receiving or giving a receipt for his moveable property without the consent of a *conseil judiciaire*, i. e., legal adviser.

This judgment only affects and modifies the status of a 'prodigal' and will be disregarded by English Courts as it is a disqualification unknown to English Law.

Where such a person became entitled to a fund in an English Court he was held entitled to payment notwithstanding the opposition of his '*conseil judiciaire*.'

In re Fenwick—Stobart and Co., Limited v. Deep Sea Fishery Company's (Limited) Claim [1902], 1 Ch. 507.

Two Companies—Common Secretary—Knowledge coming as Secretary of one Company—Duty to disclose—Bill of exchange—Dishonor—Notice.

Where a man acts as Secretary of two companies, a fact which comes to his knowledge as Secretary of one company, is notice to him as Secretary of the other company only if it is shewn that it was his duty to the 1st company to communicate it to the other company. Otherwise there is no notice from the mere existence of the common relationship.

1. 28 W. R. 346; 49 L. J. (Ch). 261.

Where, therefore, there were 3 companies, a bill of exchange was drawn by one company to their order on the 2nd company which accepted it, and the 1st company endorsed it to the 3rd and it was dishonored by the 2nd company, but there was no notice of dishonor to the 1st company, though there was a common Secretary for the 1st and 3rd companies who had notice on behalf of the 3rd company.

Held, that the 1st company had no notice of dishonor and that they as drawers were discharged from liability.

In re Ferneley's Trusts [1902], 1 Ch. 543.

Will—Restraint on anticipation—Gift to class—Some in existence and some not—Effect of restraint.

A restraint on anticipation imposed in a will upon all the shares of the daughters of the testator's children is good as to those members of the class who are born in the testator's lifetime, but void as to the shares of those born after.

Neaverson v. Peter borough Rural District Council

[1902], 1 Ch. 557.

Lost grant, presumption of—Length of user.

If a grant could not have had a legal origin, then it is not competent to presume its existence.

A lost grant cannot be presumed when such a grant would have been in contravention of a statute. In cases where the grant could have a legal origin, if the grant sought to be presumed were one which affected the rights of a large number of the public, and of which one would suppose there would necessarily be some public record, if it really ever existed, and the period of user were comparatively short, it would be more difficult to infer the existence of the grant than it would be where the grant suggested was by some single and clearly competent owner, in which case a shorter period of user would suffice.

Deverges v. Sandeman, Clark and Co. [1902], 1 Ch. 579.

Mortgage—Implied power of sale—No time fixed for payment—Reasonable notice.

The mortgagee of shares has, in the absence of an express power of sale, an implied power to sell the shares on default by

the mortgagor in payment of the amount due at the time appointed for payment, or if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain.

A month's notice or even less may be a reasonable notice.

Per Vaughan Williams, L. J.—The notice, in cases when the loan is not payable within a fixed time, must require payment of the mortgage-debt on a day certain, *i. e.*, must require the mortgagor to redeem on a certain day; otherwise it will be bad.

In re Handman and Wilcox's Contract [1902], 1 Ch. 599.

Specific performance—Purchaser without notice—Doubtful title.

A purchaser with notice from a vendor without notice is entitled to the same protection as the vendor was entitled to. This will be so when a question arises between incumbrancers claiming against the estate. In a suit for specific performance a title depending upon the fact of notice will not be forced upon a purchaser.

*Freer v. Hesse*¹ referred to.

A court may force upon a purchaser a title depending upon the construction and effect of a general statute.

*In re Carter and Kenderdine's Contract*² referred to.

Oliver v. Governor and Company of the Bank of England
[1902], 1 Ch. 610.

Principal and Agent—Implied warranty of authority—Forged power.

The rule to be deduced from *Collen v. Wright*³ is that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

1. 4 D. M. & G. 503.

2. [1897], 1 Ch. 776.

3. 8 E. B. 647.

The rule in *Collen v. Wright*¹ is not limited to a case where the professing agent proposes to make a contract on behalf of his alleged principal, but it extends to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority.

Where, therefore, a stock-broker produced to the Bank of England a power of attorney for the sale and transfer of consols standing in the names of the two persons, and one of the names was forged, but nobody knew of it, and the stock-broker demanded the bank to execute the transfer, and the Bank in pursuance of their statutory duty executed the transfer in their books, and upon the person whose name was forged suing for retransfer and for back dividends and obtaining judgment, the bank sued the stock-broker for indemnity:—

Held, that there was an implied warranty by the stock-broker of the authority upon which he demanded of the bank the performance of their statutory duty, and that he was, therefore, liable to indemnify the bank.

Kelly's Directories, Limited v. Gavin and Lloyds,
[1902], 1 Ch. 631.

Copyright Act, 1842 (5 and 6 Vict. C. 45) S. 15—Infringement—Print or cause to be printed—Estoppel.

If a man who has a right to print a book stands back and allows some one else to do the printing, it cannot be said that he 'causes' the book to be printed within the meaning of S. 15 of the Copyright Act 1842 (5 and 6 Vict. C. 45.)

Where, therefore, there was a contract between Gavin and Lloyds that the latter should publish Gavin's book, and Lloyds after printing some of the sheets, including the title page, found they could not complete the remaining sheets and Lloyds relinquished the contract and Gavin printed the other sheets elsewhere, some portions of which were alleged to be pirated from the plaintiff's book, and the book, when published contained a statement on the title page 'printed at Lloyds' and Lloyds, were not aware of the piracy and the printed matter were not among the

1. 8 E. & B. 647.

sheets printed by them and Gavin and Lloyds were not partners and the plaintiffs brought the suit against Lloyds and others for restraining Lloyds from publishing &c. :—

Held, (1) that Lloyds were not liable under S. 15 of the Copyright Act as they did not print the pirated matter nor 'caused' the pirated matter to be printed,

and (2) that Lloyds were not estopped by the statement in the title page from asserting that they did not in fact print the pirated matter.

Baily and Co., v. Clark, Son and Morland [1902] 1 Ch. 649.

Water—Artificial watercourse—Natural stream—Riparian Proprietors—Presumed lost grant

In the case of a natural watercourse, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land i. e., the reasonable use of the water for domestic purposes and for his cattle without regard to the effect which such use may have upon proprietors lower down.

Further, such riparian proprietors have a right to the use of it for any purpose or what may be deemed the extraordinary use of it (such as for the use of a mill or for irrigation) provided that he does not interfere with the rights of other proprietors, either above or below him.

*Miner v. Gilmour*¹ referred to.

In the case of an artificial watercourse, however, any right to the flow of the water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs.

Held, by the Court of Appeal that upon the evidence in this case the watercourse (assuming it to be artificial) was cut upon the terms of giving to all the riparian proprietors equally a right reasonably to withdraw water for manufacturing purposes i. e., such rights in regard to the use of the water as they would have had if the stream had been a natural one.

¹, 12 Moo. P. C. 131.

In re Weston—Bartholomew v. Menzies [1902] 1 Ch. 680.

*Donatio Mortis Causa—Building Society Share Certificates—
Post Office Savings Bank Deposit-book—Traditio.*

The Shares in a Building Society are not the proper subject-matter of a *Donatio Mortis Causa*, though under the rules of the Society there was a power to withdraw the investment shares at any time, and obtain the money for them.

A Post Office Savings Bank Deposit Book is a proper subject-matter of *Donatio Mortis Causa*. The test appears to be whether or not the document besides acknowledging the receipt of money expresses the terms on which it is held, and shews what the contract between the parties is. If it is a mere acknowledgment of the receipt of money then it is not a proper subject-matter of *Donatio Mortis Causa*.

In order to constitute a valid *Donatio Mortis Causa* it is not essential that the *traditio* should be at the actual moment of the gift.

F v. F [1902] 1 Ch. 618.

*Ward of Court—Testamentary guardian—Change of religion—
Removal of guardian.*

The father's religion is *prima facie* the infant's religion, *religio sequitur patrem*, and the guardian's duty is to see that the ward is brought up in that religion and is protected against disturbing influences of persons holding the tenets of different faith.

The court in considering the question of guardianship has regard before all things to the infant's welfare; it has regard, of course, to the rights of father and mother, but the essential requirements of the infant are paramount.

It is not simply in cases of misconduct that the court interferes to remove a guardian. Even though nothing can be alleged against the guardian, yet if it is to the interests of the child that the guardian should be removed or if the continuance of the guardian is to the prejudice of the infant, the court will remove him.

Where the ward and her parents were protestants and the ward's testamentary guardian became a Roman Catholic:—

Held, that it was for the benefit of the ward that the guardian should be removed especially when the testamentary guardian did not brook the idea of a joint guardian with her.

In re Chetwynd's Settlement—Scerfsbrick v. Nevinson

[1902] 1 Ch. 632.

Trustee Act, 1893 (56 and 57, Vict. c 63) S 25—Trustee—Discharge—Administration action—No new trustee appointed.

Under S 25 of the Trustee Act, 1893, the court cannot discharge a trustee unless it can at the same time re-appoint the continuing trustees in place of themselves and the retiring trustee.

In an action to administer a trust, however, the court always has inherent jurisdiction to discharge a trustee without appointing a new trustee in his place.

No trustee accepts the responsibility for the term of his natural life, or for more than a reasonable period. One of four trustees, who was upwards of 60 years of age, was accordingly discharged from the trusteeship.

In re Metal Constituents, Limited—Lord Lurgan's case [1902]

1 Ch. 707.

Company—Signatory to memorandum—Misrepresentation by promoter—Liability of signatory.

The contract of the subscriber of a memorandum of association is of a very peculiar kind.

Until the memorandum and articles are registered there is no contract, because the corporation does not exist.

Any contract by the signatories must be with the corporation.

At the moment of registration two things take place by force of the Companies Act.

- (a) The Company springs into existence and (b) the subscribers to the memorandum of association become, by virtue of S. 23 of the Act of 1861, members of the Company.

There is no contract at all until the moment when the corporation and the character of membership in the signatories to the memorandum come simultaneously into existence.

A person who affixes his signature to the memorandum of association makes himself on registration a member of the Company and binds him not only in favor of the Company, but in favor of every other person who becomes a member of the company.

Such a person, therefore, cannot escape from liability on the ground of misrepresentation by a promoter of the company. Such misrepresentation will not entitle the signatory to the memorandum to rescind his contract to take shares.

In re Seton-Smith—Burnand v. Waite [1902] 1 Ch. 717.

Will—Construction—Gift of furniture and other personal effects—Fixtures and trade furniture.

Where the owner of a house gives the house to A and the furniture and personal effects in it to B, A and not B would be entitled to the fixtures in the house.

Similarly, where a person who has got a leasehold interest in a house bequeaths it to A and the furniture in it to B, the tenants' fixtures in the house goes to A. *Finney v. Grice*¹ followed.

Where, therefore, a testator who was an innkeeper carrying on business at the Robuck Hotel of which he was a yearly tenant had furniture and effects used both for his domestic and hotel business and had further trade and tenant's fixtures and bequeathed 'all the furniture and other personal effects' belonging to him at the Hotel to one Miss Waite and gave the residue to others :—

Held, that Miss Waite was not entitled to trade or tenant's fixtures but was entitled to the furniture, linen, plate, glass, China and other effects at the hotel whether used for domestic purposes or for purposes of his hotel business.

Grove v. Portal [1902] 1 Ch. 727.

Lease for term—Covenant not to assign or part with possession, effect of.

A covenant not to part with the possession of the premises would not have restrained the tenant from parting with a part of the premises. *Church v. Brown*¹ followed.

A covenant against assignment does not prevent the tenant from underletting unless the words forbid an assignment for any part of the term.

Where, therefore, a lessee (of the exclusive right of fishing in a certain portion of a river) covenanted that he would not during the term underlet, assign, transfer, or set over, or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over unto any person or persons whomsoever without the consent in writing of the lessor, his heirs or assigns:—

Held, that the lessee was not precluded from granting a license to another person to fish in the river during the term granted by the lease.

In re Crace—Balfour v. Crace. [1902] 1 Ch. 733.

Principal and surety continuing guarantee—Bond to secure integrity of employee—Death of surety—Notice—Discharge of surety.

A continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated.

*Offord v. Davies*² followed.

Where the guarantee is under seal it has been held at law that the guarantor is not entitled by notice to determine its operation.

But in equity a distinction is taken, *i. e.*, between a guarantee where the consideration is fragmentary, supplied from time to time and therefore divisible and a guarantee where the consideration is

1. 15 Ves. 258; 15 B. R. 74.

2. 12 C. B. (N. S.) 748.

indivisible. In the former case the operation of the guarantee as to future transactions may be determined by notice. But in the latter case, *i.e.*, where the consideration for the guarantee is indivisible and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring an office or employment upon any person whose integrity is guaranteed, the guarantee cannot be determined *eo instanti* by notice unless expressly stipulated.

Whether it can be determined by giving reasonable notice (say 6 months) :—*Quære.*

Where an office or employment is conferred in consideration of a guarantee the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice or to be determined by his own death :—*Quære.*

In re Bozzelli's Settlement—Husey Hunt v. Bozzelli.

[1902], 1 Ch. 751.

Conflict of laws—Marriage—Capacity—Law of domicile—Marriage of deceased husband's brother—Italian subject—Lord Lyndhurst's Act 1835 (5 and 6 Will &c., 54) S. 2.

The general principle is that the domicile of the parties governs the essentials of the contract of marriage.

The marriage of a person with his deceased wife's sister will be valid or otherwise according to the domicile of the parties. If they are British subjects domiciled in England, then the marriage is invalid. The marriage is void in such a case not because it is contrary to the law of God but because English Municipal law has prohibited it.

Marriage with a deceased husband's brother though forbidden by Lord Lyndhurst's Act is not contrary to the law of God. Where the parties are Italians and subjects of Italy and such a marriage is valid according to the law of Italy it must be recognised as valid also by English Courts.

If a marriage is stamped as incestuous by the general consent of Christendom, then such a marriage may be invalid everywhere though permitted by the law of domicile.

In re A & A. Crompton and Co's., Trade-Mark [1902] 1 Ch. 758.

Trade-Mark—Rectification of register—Combination of devices.

A registered trade-mark will not be removed at the instance of a rival trader, simply because it consists of a combination of a prior mark with something not distinctive.

It is not necessary in the case of such a combination that all its parts should appear on one label or be visible at once.

Where a mark is registered for too wide a class of goods the proper remedy of the rival trader is restriction and not removal.

In re Haslam & Hier-Evans [1902] 1 Ch. 765.

Solicitor and client—Commission—Duty of Solicitor.

All transactions between solicitor and client which result in the solicitor's obtaining a benefit for himself, are subjected by courts of law to strict scrutiny, when called in question by the client and are treated as imposing obligations on the solicitor of greater or less stringency.

In some cases the obligation goes so far as almost to bind the solicitor to abstain from a transaction of the kind while in others the law does not exact so much. The case of solicitor accepting remuneration beyond that to which he is legally entitled while the relation of solicitor and client exists is of the former class but a purchase by a solicitor from the client is of the latter class. In the latter case the solicitor is bound to prove that his client was fully informed and duly and honestly advised, and that the price was just.

Where, therefore, a person appointed a solicitor to act for him in negotiating and carrying into effect the purchase of certain patent rights and the solicitor had obtained from the vendor a commission note, under which the solicitor was entitled to a certain commission in the event of introducing a purchaser and the commission note was handed over to the purchaser and the latter was given full information relating thereto:—

Held: (1) that this was not a secret profit obtained by the solicitor,

(2) that as the solicitor had given full information to his client he had discharged his duty, and

- (3) that the solicitor was entitled to the commission and the purchaser or his executors were not entitled to deduct the sum so received from the vendor in a taxation of costs as between themselves and the solicitor.

Smith v. Kerr [1902] 1 Ch. 774.

Charitable purpose—Maintenance of schools—Cliffords' Inn. Cliffords' Inn and other Inns of chancery were from the first (at any rate, from the time of Fortescue and Coke) and even now are schools of learning. These Inns existed from the first and do exist for the maintenance of schools of learning and are therefore charitable institutions, the maintenance of schools of learning being a charitable purpose specifically named in the statute of Elizabeth.

In order to determine whether any property acquired by or granted to the Inn is fixed with a charitable trust, what has to be considered is the purpose to which it is applied but not the source from which it is derived. It does not matter how a fund dedicated to charitable use has been raised or where it comes from but the real test is to see the purpose for which it is applied. See *Attorney-General v. Eastlake*.¹

The property known as Cliffords' Inn and acquired from the original grantors (Lord Cumberland and Lord Clifford) for consideration, is affected with a charitable trust and is not the private property of the individual members of the society of Cliffords' Inn.

Jacobs v. Morris [1902] 1 Ch. 816.

Power of appointment—Agency—Authority to borrow—Money had and received.

The implied powers of an agent appointed by a trader are very different from the implied powers of a partner in a similar business.

Prima facie, an agent cannot borrow unless he has express authority.

Where a power of attorney appointed a person as commercial agent and authorized him "to purchase and make...any contract.... for the purchase of any goods...in connection with the business" car-

¹, 11 Hare 205.

ried on by the principal and authorized him to make such purchase either for cash or credit and gave him power to modify or cancel the contracts for purchase and to make, draw, sign, accept, or indorse any bills of exchange or promissory notes whenever necessary in connection with the business and further to sign the principal's name or his trading name to any cheques on his banking account in a certain place :—

Held that such a power did not enable the agent to borrow.

Where an agent in fact borrowed a certain sum from another who had constructive notice of the want of authority of such agent and neglected the ordinary business precaution of looking at the power and the agent paid the money so borrowed into the principal's banking account but afterwards drew the same out and applied it to his own use.

Held that they were estopped from recovering the amount from the principal as money had and received to their use.

Whitbread and Co., Limited v. Watt [1902], 1 Ch. 885.

Vendor's lien—Contract rescinded under power.

The lien which a purchaser has for his deposit is not the result of any express contract. It is a right which has been invented for the purpose of doing justice and hence it is a fiction of a kind resorted to at law and in equity just as in actions for money had and received to the use of the plaintiff. It is not true that the money has been so received but that is the way in which the law states the case in order to do justice.

The vendor's lien arises

- (1) in a case where the contract has gone off through default of the vendor.
- (2) in a case where without any default of either party the contract goes off and cannot be completed.

The latter case may arise when the vendor is unable to make a title or where the purchaser elects to rescind under power reserved to him by the contract.

The purchaser immediately upon paying this money acquires a lien which is not defeasible except where the purchaser is himself in default.

In re Barnett's Trusts [1902], 1 Ch. 847.

Private International law—Moveables—Law of domicile—Crown taking as bona vacantia.

The maxim *mobilia sequitur personam* applies only to the distributable residue and applies only to a case of distribution. The distribution of the distributable residue of the moveables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death. The law of the domicile applies only to a case of distribution. But where there is no distribution at all to be made this law has no application. In cases where the Crown claims the estate of the deceased in default of heirs, the Crown takes it not by succession but as *bona vacantia*. The principle of such cases is that the right to take that which belonged to no one appertained to the crown as *jura regalia*.

When the Crown is spoken of as the '*ultimus heres*' it is not only not English law but it is perfectly inaccurate.

The word 'confiscated' is capable of being used in many senses. In the ordinary sense it is applied to a case where the property is taken by the Crown by way of penalty. It is also used in another sense *i. e.*, when the Crown intervenes to take property, because it is *vacant* or because the deceased to whom the property belonged died heirless.

Where, therefore, an Austrian died without leaving any heirs but possessed of personal property in England :—

Held that the English Crown is better entitled to take such property as *bona vacantia* in preference to the Austrian Government.

Wales v. Carr [1902], 1 Ch. 860.

Mortgagor and mortgage—Redemption action—Costs, charges and expenses—Protecting mortgaged estate—Costs of mortgagee's solicitor negotiating loan.

A mortgagee's right in a redemption action to be paid the costs, charges and expenses incurred by him for the purpose of protecting the mortgaged estate or his own right as mortgagee is founded not on any implied contract by the mortgagor to pay the costs but upon the principle that it is a condition of redemption which a court of equity imposes on the mortgagor in return for the indulgence shown him by the court. No action of debt could be

maintained by the mortgagee against the mortgagor for such charges, costs and expenses. But the costs of the mortgagee's solicitor for negotiating the loan and preparing the mortgage deed become on completion of the transaction a simple contract at common law between the mortgagee and the mortgagor and such costs can only be recovered by a suit against the mortgagor but cannot be tacked to the mortgage amount.

In re Davis—Hannen v. Hillyer [1902], 1 Ch. 876.

• *Cyprés—General charitable intention.*

If there be a gift to a charitable institution which existed, but has ceased to exist, there is a lapse.

Where there is a gift to a charity which has never existed at all, courts lean in favor of a general charitable purpose and will accept even a small indication of the testator's intention as sufficient to show that a purpose and not a person was intended. Where, therefore, a testatrix made several charitable dispositions and the objects of her gifts such as the blind, orphan, hospitals, blind and deaf &c., were good and she gave the residue also for the same charitable institutions which are beneficiaries under the instrument and gave a legacy to "the home for the homeless," which institution never existed:

Held (1) that such a legacy did not lapse to the next of kin but was effectual, the doctrine of *Cy prés* being applicable to such a case, and

(2) that the word "institutions" was large enough to include any authority that would have to administer the fund which would go rateably to the several charitable institutions including the one that would have to administer it.

In re Beaumont—Beaumont v. Ewbank [1902], 1 Ch. 889.

Donatio Mortis Causa—Gift of cheque—Death of drawer before payment—Traditio.

A *donatio mortis causa* is a transaction of an amphibious nature and is a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. In order to make the gift valid it must be made so as to take complete effect on the donor's death.

The following are good subjects of donation.

- (a) Promissory note payable to the deceased's order but not indorsed ;
- (b) Bills of exchange in favor of the deceased or his order ;
- (c) Bills of exchange payable to order and which have not been endorsed ;
- (d) A cheque payable to the donor's order and not indorsed ;
- (e) A banker's deposit note.

If in the above cases the donee had obtained either the property or the indicia of title before the donor's death there is a valid *donatio mortis causa* capable of being enforced against the personal representatives of the donor. There must be a delivery of the property or the indicia of title so as to raise a trust in favor of the donee. A man's cheque in favor of another person is not an equitable assignment of any part of the donor's balance at the bank. It is only a revocable mandate which may be stopped in the donor's lifetime and is revoked by his death. Nor is a man's cheque property. It is a revocable order which is revoked by the donor's death. Even without actual payment of the cheque there may be a good gift where the banker undertakes to pay or to hold the amount of the cheque for the donee.

Where, however, a cheque was made the subject of *donatio mortis causa* and had not in fact been paid by the banker before the death of the donor and the banker did not promise to pay the money but promised to lend as the donor's account was overdrawn at the time, held that there was no valid *donatio mortis causa*.

Anderson v. Berkley [1902], 1 Ch. 936.

Legacy—False description—Named individual.

Where the description is made up of more than one part and one is true but the other false, then if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected and will not vitiate the gift. •

Where, therefore, a testator gave a legacy to his son's wife naming her and describing her as the wife of his son and it appeared

that there was no marriage but that the son and the legatee lived as husband and wife:—

Held, that the gift being to a named individual and there being no fraud practised on the testator by the legatee, the false description did not vitiate the gift.

Gophir Diamond Company v. Wood [1902], 1 Ch. 950.

Restraint of trade—Covenant not to be interested—Servant for remuneration.

The word 'interested' refers to proprietary or pecuniary interest. A servant for remuneration cannot be said to be interested in the business in which he is employed by the master.

A covenant not to become directly or indirectly 'interested' in a business similar to that of the covenantee unlike a covenant not to be 'engaged or concerned' in such business will not prevent the covenantor from becoming a servant even though for remuneration. Employment as a servant at a fixed salary constitutes no breach of such covenant.

JOTTINGS AND CUTTINGS.

The Advocate-General and Mr. Justice Boddam:—It was rather a strange scene the Advocate-General thanking Mr. Justice Boddam for patience in the trial of a suit for twenty days. Apparently the Advocate-General has not had much experience of cases taking twenty days together. There are plenty of Munsifs and Sub-Judges who will laugh at the idea of being thanked for patience during a twenty days trial. There are scores of cases being tried in the year in which the number of documents filed on each side exceeds by far the number filed in the case, the importance of which seems to have unduly impressed the Advocate-General. A High Court Judge of all people is not the person to be thanked for patience. Of course, it was not Mr. Justice Boddam's fault that he had to listen to the compliment. The Advocate-General was not acting altogether wisely. He was laying himself open to the, no doubt, unfounded suspicion of an attempt to humour the presiding Judge.

* *

Mr. Justice Davies again.—In the course of the argument of a second appeal, Mr. Justice Davies appears to have caught a lawyer tripping, in making some statement to the Court,

In the particular instance, Mr. Justice *Davies* was right and the lawyer wrong. He was contradicted on a matter in which he was wrong. At once the irate judge characterised the argument as improper pleading and he proceeded to explain in his own fashion what the improper pleading on the part of the lawyer was. The lawyer concerned, an honourable man and a respected member of the profession, protested, sat down and left the court. This is one of several instances of Mr. Justice *Davies*' mode of dealing with members of the profession. We do not know when he will learn or how he may be taught that mistaken statement is not wilful misrepresentation and that inaccuracy is not falsehood. If he had ever practised at the bar, he would certainly have appreciated the difference. It is an unmixed evil that men sit on the bench who have never stood at the bar.

* * *

The Jagampet Case :—The decision of the Judicial Committee must have given a rude shake to the hitherto accepted notions of Mitakshara Law and the decision itself came upon the legal world as a surprise. Shortly stated the decision, as we understand it, is that survivorship exists also as regards obstructed inheritance. The survivorship here referred to is that found in the Mitakshara joint family. It is not the survivorship which under all systems of jurisprudence or at any rate under the English system is found to exist in the case of a joint grant to two persons. In such a case survivorship exists between the donees themselves, and this survivorship will exclude even the issue of the deceased donee. Survivorship, as known to the Mitakshara Law, will exclude only the widow, daughter &c., and will not exclude the male issue. How such a survivorship can be said to exist in the case of daughter's sons inheriting to their maternal grandfather's estate and how the same can be said to be deducible from the analogy of the inheritance of widows and daughters it is impossible to see. We should have thought that in the case of several widows or daughters inheriting no question of survivorship, at any rate as known to exist among the members of a joint Hindu family in the Mitakshara or among joint tenants in the English Law, would arise. We should have thought that on one of the widows dying the other widow or daughter takes as heir of the last male owner, her husband or her father as the case may be. She survives the other widow or daughter whose estate was only

for life and is the heir and as such takes the property. But this seems to be opposed to the ruling of the Judicial Committee in *Aumirtolall Bose v. Rajoneekant Mitter*,¹ which holds that two daughters take their father's estate with right of survivorship and that such right was a vested right not defeasible by the daughter becoming unchaste subsequent to the father's death and prior to the death of the other daughter. But what is the right of survivorship that is said to exist in case the widows and daughters die? Surely, daughters cannot be co-parceners in the Mitakshara sense of the term and nobody has yet dreamt that widows may be co-parceners though they may be members in a joint family. The rights of survivorship existing in the case of widows or daughters are not even such rights of survivorship as are possessed by joint tenants under English law. The estate taken by each widow or daughter is limited. In the case of daughters, this right of survivorship excludes the issue as in English law and in the case of widows from the very nature of the case there are no sons. It is, therefore, impossible to conceive how from the analogy of the widows and daughters one can jump to the conclusion that daughter's sons should take by survivorship as that term is known in the Mitakshara Law. From the judgment and from the arguments of counsel, it will clearly appear that the survivorship as known to Mitakshara Law of co-parcenary was the one that was meant and that the Judicial Committee did not mean to hold that daughter's sons take as joint tenants as known to the English law. This latter point is reserved for the case of sons of different daughters succeeding to the maternal grandfather and not capable of forming a co-parcenary. If it is held that sons of a daughter take as joint tenants in the English sense of the word, there may be something to be said for it; but this view will not be acceptable to the Judicial Committee having regard to their decision in *Jogeswar v. Ram Chand*.² The decision of the judicial committee is well-nigh going to the old Hindu Law view that all property must be joint and that members living in co-parcenary should exclude the widow as regards any kind of property possessed by a member.

Nowadays, however, we are quite accustomed to these rude shocks from the highest tribunal as in the famous case of *Sartaj Kuari*.³

1. L. R., 2 I. A. 113.

2. L. 23 I. A. 37.

3. L. R., 15 I. A. 51.

The decision of the Judicial Committee raises, however, a lot of other questions, and as a result of this decision there can be no doubt of such questions cropping up in the near future in the Indian Courts. One such question that suggests itself at the outset is what is the nature of the estate taken by the daughter's sons as regards their sons. Have the latter any right by birth? It is curious that Mr. Mayne in his argument should state as his opinion that the decisions of the Madras High Court and the Privy Council in the *Sivaganga* and *Sivagiri* cases were bad law. Apparently in Mr. Mayne's opinion the sons will have no interest. But such an answer does not exactly tally with the Mitakshara notion of the right of survivorship. Without going to the full length of saying that there can be no co-parcenary within a co-parcenary unless all the members of a branch join in such smaller co-parcenary as Mr. Justice Bhashyam Aiyangar seems to hold in *Sudarsonam Maistry's case*¹, we may say that where two persons form a co-parcenary *ipso facto* they take in their own male descendants unless they expressly contract that survivorship should exist between the two only. This express contract, however, is not the ordinary Mitakshara law. If daughter's sons have rights of survivorship in the estate taken from the maternal grand-father, and if one of them should die, does not his son living with him in co-parcenary take the estate descending to his father from the latter's maternal grand-father and is not this taking by survivorship? The daughter's son could impeach any alienation (such as gift or will) made by the other daughter's son and is not the latter's son also similarly entitled? It is held in the *Sivagiri* case that such estate is not self-acquired property and what otherwise is it? The Privy Council hold in the *Jagampet*² case it is joint property and if so, has not the son a right by birth. Of course so long as the estate has not vested even the daughter's son has no interest by birth; *a fortiori*, the latter's son. But if as the Privy Council hold the moment it has descended to the daughter's sons it is joint property the sons of the latter must also on the vesting have rights in it. A curious result, though. Suppose there was only one daughter's son, what then? These are questions which are left for future solution as a consequence of the decision in the *Jagampet*² case.

¹ I. L. R., 25 M. 149.

² XII M. L. J. 399.

Report on the Administration of Civil Justice for 1901 :—We regret to observe that the report is not very full. In this respect we also notice a change from the practice of previous years. We do not know who is responsible for it, the Registrar or the Judges of the High Court. For example, we are not given any information as regards the number of appeals preferred from judgments on the original side or how they were disposed of. We are not told how many judgments of the High Court were appealed against to the Privy Council and how that tribunal dealt with them. The High Court is apparently sensitive to outside criticism and information is denied to the public on matters which the public has a right to know, before it can effectively pronounce its judgment. It seems rather curious also, that there is no statement showing the result of appeals from District Courts to the High Court, while there is statement D₂ showing the result of appeals from Revenue Courts to District Courts, statement D₃ showing the result of appeals from District Munsifs to District Judges and Subordinate Judges, statement D₄ showing the result of appeals from Subordinate Judges to District Judges. One would like to know how the work of Subordinate Judges and District Judges fared, judged by the appeal test. The absence of this information is all the more cause for regret as it was being regularly supplied, year after year, till recently. The practice of Government reviewing these reports at length, has been put a stop to for the last two years and they are now simply being recorded. We should, therefore, be glad to see that the Reports themselves are full and contain all the desired information. We know that frequently comparisons have been made between District Judges and Subordinate Judges unfavourable to the former. But that surely should be no reason for omitting from the Report all figures and statements which afforded a basis for such comparison. We trust that Government will call the attention of the High Court to the omissions we have pointed out.

Profit on Justice :—We extract below paragraph 39 of the Administration Report for 1901. "The total receipts and charges of Civil and Criminal Courts as furnished by the Accountant General amounted to Rs. 63, 46, 607 and Rs. 49, 63, 339 respectively. The receipts from process fees in Mofussil Civil Courts, excluding discount for the sale of court fee stamps were Rs. 12, 35, 944 and the charges of the process service establishment were Rs. 65, 681."

The receipts in copy stamp papers in Mofussil Civil Courts, excluding charges on account of their supply at 20 p. c. amounted to Rs. 189,479 and the charges of the copyist establishments amounted to Rs. 155,435." The above figures speak for themselves. It seems to us, there is a strong case made out for the reduction of process fees. The court fees paid by civil suitors leave a large balance even after deducting the cost of maintaining the Criminal Courts of the country. Can no scheme be devised for obtaining better justice than we now do, for all the money that the country pays? We would recommend an increase in the number of judges of the High Court and appeals direct to the High Court from Munsifs and Sub-Judges when they dispose of cases solely on questions of law.

* *

Sittings:—We have noticed in the Administration Reports of former years, statements as to the number of days each class of judicial officer sat during the year for the disposal of civil or criminal work, and in the case of the High Court how many benches sat, of single Judges, two Judges, three Judges and so on. This information is useful in several ways and ought not to be withheld from the public. We trust that the attention of Government has been drawn to this omission.

* *

The Jury System:—The public will be curious to know what the High Court, has to say of the work of jurors during the year 1901. We take the following from the Administration Report of Criminal Justice. "The jury system is reported to have worked well on the whole. But the Sessions Judge of Madura (Mr. Moberly) states that he is beginning to have serious doubts as to the suitability of the Jury system to this country and that he is not satisfied with its working during 1901. However in 66 out of 68 cases tried by jury before him, the Sessions Judge accepted the verdict. The Sessions Judge of Trichinopoly (Mr. Joseph) states, with reference to his remark in the previous year, that he has noticed a marked improvement with regard to the appreciation of evidence by jurors". One would like to know how many judges have learnt to direct the jury properly.

* *

Right to Privacy: Injunction denied to a young woman to restrain the publication of her portrait on commercial packages for

the purpose of advertising.—A case arising in a court of New York, at Buffalo, sometime ago, attracted wide-spread attention. The action was brought in the Supreme Court of the state of New York, by a young woman, to restrain the defendants, a mill company, from printing and circulating her portrait on their packages of goods as an advertisement, they having obtained it without her knowledge or consent, and for damages. The court below granted the injunction, and its judgment was affirmed by the appellate division. The appellate division thereafter, under a provision of the statute law of New York, certified the case to the court of appeals upon two questions. Does the complaint herein state a cause of action at law against the defendants or either of them? Does the complaint herein state a cause of action in equity against defendants or either of them? The court of appeals now answer both of these questions in the negative. The court divided upon this most novel and interesting question, in the proportion of four to three. The opinion of the court is written—and ably written—by Chief Judge Parker, in which Judges O. Brien, Cullen and Werner concur; and there is a strong dissenting opinion by Judge Gray, in which Judges Bartlett and Haight concur. The allegations of the complaint are stated by Chief Judge Parker, who writes the majority opinion of the court of appeals, in the following language.

The complaint alleges that the Franklin Mills Company, one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words "Flour of the family," and below the portrait in large capital letters "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters "Rochester Folding Box Company, Rochester, N. Y." that upon the same sheet were other advertisements of the flour of the Franklin Mills Company; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places; that

they have been recognized by friends of the plaintiff and other people with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name has been attacked, causing her great distress and suffering both in body and mind: that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of \$15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating or using in any manner any likenesses of plaintiff in any form whatever, for further relief (which it is not necessary to consider here) and for damages.

The following is the argumentative portion of the opinion of the court by Chief Judge Parker:—

It will be observed that there is no complaint made that plaintiff was libeled by this publication of her portrait: The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the courts to restrain a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of \$. 15,000.

There is no precedent for such an action to be found in the decisions of this court; indeed the learned judge who wrote the very able and interesting opinion in the appellate division said while upon the threshold of the discussion of the question. "It may be said in the first place that the theory upon which this

action is predicated is new, at least in instance if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if indeed it can be said that there are any authoritative cases establishing her right to recover in this action." Nevertheless, that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy"—in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review, in an article entitled, "Rights of a citizen to his Reputation."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in hand bills, circulars, catalogues, periodicals or newspapers, and necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbours, whether the comment be favourable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances.

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to

logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for the one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only for enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme and, therefore, unjustifiable application of an old principle.

The court below properly said that "while it may be true that the fact that no precedent case be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of courts" provided, I think it should be added, there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it.

It is undoubtedly true that in the early days of chancery jurisdiction in England, the chancellors were accustomed to deliver their judgments without regard to principles or precedents, and in that way the process of building up the system of equity went on, the chancellor disregarding absolutely many established principles of the common law. "In no other way," says Pomeray, "could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions." In this work the chancellors were guided not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences but after a time, when "the period of infancy was passed and an orderly system of equitable principles, doctrines and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors by a juridical and not a personal conscience."

The importance of observing the spirit of this rule cannot be overestimated, for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system, which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts.

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity, assuming—what I shall attempt to show in a moment—that the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the *Harvard Law Review*—already referred to—in which a number of English cases were analysed, and, reasoning by analogy, the conclusion was reached that—withstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction—in reality such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing and the arts, which is like the right not to be assaulted or beaten; in other words, that the principle, actually involved though not always appreciated was that of an inviolate personality, not that of private property.

This article brought forth a reply from the *North Western Review* urging that equity has no concern with the feelings of an individual or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property, and that the English authorities cited are consistent with such view. Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations, or, on the other hand, are entirely consistent with it.

The learned Judge then reviewed the cases cited. He then concludes his opinion with the following further observations:—

I do not say that, even under the existing law, in every case of the character of the one before us, or indeed in this case, a party whose likeness is circulated against his will is without remedy. By section 245 of the Penal Code, any malicious publication by picture effigy or sign which exposes a person to contempt, ridicule or obloquy is a libel, and it would constitute such at common law. Malicious in this definition means simply intentional and wilful. There are many articles, especially of medicine whose character is such that using the picture of a person particularly that of a woman, in connection with the advertisement of those articles, might justly be found by a Jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or

posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action, treating it as one of libel. This case differs from an action brought for libellous words. In such case the alleged libel is stated in the complaint, and if the words are libellous *per se* it is unnecessary to charge that their effect exposes the plaintiff to disgrace, ridicule or obloquy. The law attributes to them that result. But where the libel is a picture which does not appear in the record, to make it libellous there must be a proper allegation as to its character.

The grounds on which Judge Gray and the other dissenting Judges proceed will be found in the following passages from the dissenting opinion:—

Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form, *in invitum* their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of an individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares; and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration, by the great commentators upon the law, of a common-law principle which would precisely apply to and govern the action; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack. I think that such a view is unduly restricted too, by a search for some property, which has been invaded by the defendant's acts. Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer, has been protected in his right to literary property in a letter or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches.

I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively, until, the use be granted away to the public. (36, *American Law Review* 614 to 620).

CONTEMPORARY LEGAL LITERATURE.

Law Magazine and Review—Inns of chancery.—In the August part of the *Law Magazine and Review* there is an interesting article on the working of the Inns of chancery and the instruction given

therein. The writer there says that though the mere academical instruction in law is doubtless better now than it has ever been before yet no practical knowledge of professional work is now obtained by the students and regrets that the old practice of 'Bolts'¹ and 'Exercises' consisting of Moots² and grand moots³ which ensured this practical knowledge has now gone into disuse. He then explains what part the ancient office of Reader played in the system of education given to a barrister and gives very useful and instructive information relating to the work done by former students and the instruction received by them. He points out that formerly serjeants (who are now King's counsel) were readers and instructed the students and these serjeants were generally eminent men who were leaders of the bar and from whom the Judges were selected. Even the Judges took some part in giving instruction to the students of the Inn. The writer very much desires that this office may be revived and that the heads of the profession or occupants of the Bench should give lectures so as to fit the students for practical work, and throws the blame on the heads of the profession for this state of affairs. It is a curious and a happy accident that these suggestions should substantially agree with the suggestions made in the University Commission Report for education in India. Though we have at the present day no Judges in India like, at any rate, Lord Davey or Lord Lindley, barring a few rare instances, yet we have no doubt that some practical training should be supplemented to the theoretical training already received by the students and that this practical training should go hand in hand with the theoretical training and that some of the best leaders of our bar and some of our Judges may go in for their share of training the student of the law. It may be said that the apprentice-course which the future lawyer has now to undergo in Madras is intended for this, but we think that this is only meeting the necessity in a half-hearted way and that in many cases scarcely the apprentice begins to learn when his term expires and he has to go out. We also think that such instruction should be given when the student is learning the theory of law and that the theoretical and practical training should go hand in hand.

1. The private arguing of cases before an Ancient and two Utter Barristers as Judges.

2. Argument meetings in which 'exercises' were held, and in which the reader and two benchers presided as Judges.

3. Meetings in which the Judges presided together with such benchers as chose to give attendance.

In an article on '*Secret Commissions*' the writer Mr. Anthony Pulbrook (*The Law Magazine and Review* for August p. 447) indulges but very properly in an attack on the morals and the standard of respectability of the so-called gentlemen 'in the City.' The whole end and aim of men in the American states is to pile up dollars for 'almighty dollar' rules everywhere nowadays. There is nothing wrong in making money at any cost provided of course no corrupt practices are indulged in its acquisition. Probably in these days of advancing civilization with numerous openings for the acquisition of wealth there may be nothing wrong in the existence of a class of men whose business is to receive commission for any service done. It is wrong for people who are bound to do some duty to receive secret money for doing the duty. It is equally wrong for persons who exercise a public calling regarded as independent such as newspaper editors &c., to receive secret money for exercising that public calling. It is a greater wrong for a person who has got a secret commission to pose as a friend and as a person quite unconcerned and disinterested and try to do for his friend some service *gratis* when as a matter of fact he is paid by some third person who is interested in getting such service done. If a person who is the secret agent of a banker receives some secret commission from him for bringing business to him, it is wrong for such person to appear as one unconnected with the banker and to induce people to do business with him. The wrong in these cases consists not in receiving the commission but in receiving it without telling his friend that he would get the commission for inducing him to do the business. It is this that made the writer to exclaim that a bold thief who robs another in open daylight carries more respect than this man, a canting hypocrite, who under pretence of his being a friend accepts pay for assisting others in robbing. Many of the examples given by the writer are the natural abuses of advancing civilization. We do not know how many of them exist in India. We do not know how many journalists are paid for prostituting the independence of the press by advertising men or people to the skies for the mere purpose of advertisement, and we do not know how many advertisements for the promotion of companies or the sale of shares are made merely for receiving money, or for being interested in such business. We hope not many at any rate. But we suppose there exists here a system of

commissions by offering "free gifts" for the sale of worthless articles of a type similar to the one described by the writer. There is no wrong committed if the person receiving the commission discloses the true nature of the transaction and does business as some doctors do by prescribing some patent medicines from a particular chemist.

The Journal of the Society of Comparative Legislation (July 1902) has made its appearance with an excuse for its being so late. It begins with a memoir of the late Lord Watson who was a constant attendant Member of the Privy Council in most of the appeals from India, and there can be no doubt that India—not to speak of the colonies—has great reason to regret his loss. The Right Honorable R. B. Haldane in an address headed "*The Constitution of the Empire and the Development of its Councils*" makes some useful remarks about the constitution of the Greater Empire which is now the constant theme of the Emperor's subjects in all parts of the Empire. He points out that just as in England the power shifted from the Crown to the Imperial Parliament and from the House of Lords to the House of Commons in the past so it is shifting from the House of Commons so far as Imperial questions are concerned. He points out that the Imperial Parliament stands only in the position of a trustee for colonial interests and that it cannot be said that colonial questions form the theme of any electoral campaign among the electors in the home constituencies. This may be true of the colonies and in a certain sense also of India as no Indian question is in issue before them no elector taking any interest in the same. The constitution of the Empire is a thing growing and though it is Mr. Haldane's opinion that, the same traditions obtain in Australia, in Canada, in South Africa, and even to some extent in India, it remains to be seen what it is going to be. Nothing definite can be said but that all parts of the Empire are passing through a wave of Imperial development there can be no question. What phase this will take is a problem for the politician.

In a rather dry article on *Papinian*, Mr. Clarke narrates the part played by the Great Roman Jurist. There is one suggestion made by Mr. Clarke which can well take a practical shape and that is the desirability of an authoritative revision and reduction of case law to the form of general rules. Every lawyer will, we are sure, find a great relief if this useful suggestion can be given practical effect to.

Right of Privacy :—In the American law journals the question of the right of privacy has now come to the forefront. See Canadian Law Times for August, the American Lawyer for July, The American Law Review for July.

The question arose in the New York Court of Appeals in *Robinson v. Rochester Folding Bed Co.*, 27 New York Law Journal No. 83. The question there was whether a lady had a right of complaint against the defendant exhibiting lithographic prints of her likeness in his business advertisement intended for advancing his trade. The Court of Appeal by a divided court of 4 Judges to 3 denied that the lady had any right of complaint. The majority held that an injunction cannot be invoked except in protection of a property right or in preventing a breach of trust or of a libellous publication and that no man has the right to pass through the world without having his picture published, his business enterprises discussed, his eccentricities commented upon in hand bills, &c. Two reasons were given for this decision; 1st in case of public characters there can be no doubt that their likenesses can be published and their actions made the subject of comment or talked about by the public; 2nd, liberty of the press will be curtailed for, if the right of privacy be allowed, it cannot be confined to the publication of a likeness but must embrace the publication of a word-picture, a comment upon one's looks, conduct, domestic relations &c.—The various journals take sides on this question but even those who hold that the decision is right admit the hardship of there being no redress in such a case. (The American Lawyer for July p. 293). Our sympathies are with the plaintiff and in coming to a right decision on the question we should think that the mere fact that the old Year Books or the old writers do not consider the question does not negative the right. Photograph is only a modern invention not imagined by Coke and other writers and that system of law which does not give a remedy for the abuses of modern civilization has no claim to be recognized as a rational science.

REVIEWS.

The Law of Master and Servant. BY CHARLES MANLEY SMITH, 5th Edition, 1902. Published by SWEET AND MAXWELL, LD., 3 Chancery Lane, London.

This is a comprehensive treatise on the Law of Master and Servant, and deals with all the various questions which are likely to arise out of the relation. The present edition has collected all the material decisions up to date and will save the practitioner the trouble of searching for authorities from among a large number of text-books and digests. Though there is not much independent discussion of principles, the systematic statement of the rules laid down in decided cases must render the work highly useful to the profession. The law relating to combinations and conspiracies amongst masters and workmen is one of growing importance and interest in England, but receives a somewhat meagre treatment in the book. The provisions of the Employers' Liability Act and the Workman's Compensation Act have been the subject of an ever-increasing number of decisions which have not been brought within the scope of the work, though the statutes alone find a place in the Appendix.

Mortgage Suits. By M. L. AGARWALA, 1902. Published by the INDIAN PRESS, Allahabad. Price Rs. 10.

This is a useful hand-book of the principles and procedure to be observed in suits on mortgages. It deals with the subject of parties to mortgage suits, the allegations to be made in the plaint and the various defences to be raised and the forms of decrees in such suits. There is no real attempt at criticism of any cases, but the author has contented himself with bringing together all the recent decisions upon the topics dealt with. The author's advice to practitioners is likely to be a little perplexing. For instance, in page 37, the author states that in a suit for sale particular care must be taken to describe the kind of mortgage (Simple, Usufructuary, English, by conditional sale or anomalous) you are relying upon. But in the very next sentence the author says:—"It is always safer, especially in suits for sale, not to say that the mortgage is simple or usufructuary with a power of sale or an English mortgage." We cannot agree

with the author in his criticism of the recent Privy Council decisions as to the right of a creditor to *post diem* interest, nor can we see that he is successful in the distinction he draws between a charge and a mortgage. Again the statement at the top of page 337 that a material alteration of a mortgage deed destroys its efficiency altogether cannot be commended as accurate in view of the decision noticed by the author himself later on. The book is, however, likely to be useful to practitioners and especially those in the mofussil as a handy repertory of recent cases.

Hindu Reversioners' Suits under Arts. 125 and 118 of the Limitation Act. By V. VENKATACHALLUM AIYAR, *High Court Vakil, Nellore*.—Published by the EMPRESS OF INDIA PRESS, Popham's Broadway, Madras. Price Rs. 2.

We recommend this book to the notice of the profession as a thoughtful essay upon the question whether a reversioner who brings a suit under either Art. 125 or 118 occupies a representative character. The author has collected and criticised all the rulings bearing upon the point, and until the question is authoritatively settled, the book cannot fail to be of service to practitioners and judges who may be obliged to consider the question. The want of a table of contents and an index is a draw back to the usefulness of the book.

The Succession Certificate Act with Introduction, Notes, etc. By N. SWAMINATHAN, B.A., B.L., *Pleader, Tanjore*. Graves, Cookson & Co., Madras, 1902.

This is another annotated edition of an enactment of frequent reference. The author has collected almost all the important decisions bearing on the Act, but the collection cannot be said to be complete; and unofficial reports like the Allahabad Weekly Notes, and the Bombay Law Reporter appear not to have been consulted. The notes are clear, but might be briefer, and the author might well have avoided lengthy narration of the facts of the cases cited—See especially the notes to section 4 sub-section (1) clause (a) and sub-section (2). No attempt has been made to discuss the decisions cited and the conflicting views of the several High Courts on many questions are merely referred to without comment. The proceedings of the Legislative Council, which by the

way, are not to be referred to in the interpretation of the Act, are re-printed at length. We commend the book to the profession.

Law Examination Manual No. 2. Hindu Law BY *Trikamlal B. Desai*, B.A., L.L.B., published by Messrs. Ramachandra Govind & Sons, Publishers, Kalbadavi Road, Bombay, price Rs. 2.

We do not know what use this book is intended to serve. We must confess we are altogether against publications of this kind. But when a book of this class contains mistakes grammatical, literary and legal, it cannot be too strongly condemned. We trust the author will not repeat an experiment of this description.

Admiralty Practice. By Williams and Bruce. We have received from the well known English Publishers Sweet and Maxwell Ltd., a copy of the 3rd edition of Williams and Bruce's Admiralty Practice. The value of this book in a commercial country like England cannot be too highly estimated. That Mr. Justice Gainsford Bruce has, amidst his arduous duties as puisne Judge of the Probate Division, been able to find time for the preparation of this 3rd edition is a circumstance which ensures the maintenance of the high standard of excellence which the book has attained. The chief value of the book is in part II treating with the practice in Admiralty. It may be that in India there is not much occasion for the profession to make reference to a book of this description. But the High Courts exercising Admiralty jurisdiction under the Charter and the practitioners attached to them will find the book of immense value.

We beg to acknowledge receipt of the following publications :—

Canadian Law Times	for	...	September.
Indian Review	"	...	September.
The Bombay Law Reporter	"	...	Sept. & Oct.
The Law Students' Helper	"	...	August & Sept.
Canada Law Journal	"	...	September.
The Law Students' Journal	"	...	September.
The Kathiawar Law Reports	"	...	September.
Law Notes	"	...	Sept. & Oct.
American Lawyer	"	...	August.
Educational Review	"	...	Sept. & Oct.
The Digest	"	...	Sept. & Oct.
The Calcutta Weekly Notes	"	...	September.
The Punjab Law Reporter	"	...	Sept. & October.
The Lawyer	"	...	September.
The Indian Review	"	...	September.
Journal of the Society of Comparative Legislation...			July (No IX.)
The Indian Journal of Education		...	August.
Admiralty Practice	<i>Williams and Bruce.</i>		
Hindu Law	<i>Trikam Lal R. Desai</i>		
Hindu Reversioners' suits	<i>V. V. Venkatachellum Aiyar.</i>		
Law of Master and servant	<i>Charles Manley Smith.</i>		
Mortgage suits	<i>M. L. Agarwala.</i>		
Succession Certificate Act	<i>N. Swaminadhan.</i>		

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PART XI.]

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[VOL. XII.]

THE CIVIL PROCEDURE CODE BILL.—(*Continued*).

Passing to the Chapter on Provisional remedies there is very little alteration that calls for comment. It may perhaps be suggested that the intention required to be proved under sections 477 and 478 in making an application for arrest or attachment before judgment need not necessarily be an intention to defeat or delay the plaintiff only. An intention to defraud creditors generally is very often more easy of proof than an intention to defraud the particular plaintiff. The addition of the words "or with intent to defeat or delay his creditors" in these two sections would be desirable.

In the Chapter on Receivers, the provision that the Court should not appoint a receiver of property in the possession of the defendant claiming under a legal title unless the plaintiff can show *prima facie* that he has a strong case and a good title to such property is unnecessary and mischievous. Though the Courts generally act upon this principle, it is not desirable to lay down a hard and fast rule to that effect. The Courts will be obliged under the proposed section to go at considerable length into the merits of the case, and this will involve a great waste of public time. The fact that the property is in the possession of the defendant claiming under a legal title should not have any great weight when it is only recent and of short duration. It may be provided that a receiver should not be liable to be sued by a party except with the leave of the Court by which he was appointed or of the appellate court. It is also desirable that the appointment of a receiver should not always come to an end with the termination of the suit in a Court of First Instance. The First Court should have the power, when necessary, to continue the appointment of a receiver till an appeal is preferred if the unsuccessful party expresses an intention of preferring an appeal. It

is further necessary that power should be given to the Courts to appoint a receiver after a decree by way of equitable execution where such appointment appears just and convenient. For instance, a judgment-debtor may be entitled to an interest in partnership and the only mode in which execution is now levied by the Court against such interests is by attachment and sale. But such method is very unprofitable, unsatisfactory and injurious to the judgment-debtor as well as to the decree-holder. If a receiver were appointed, he could collect the profits periodically payable to the judgment-debtor and render it available for satisfaction of the decree. There are many other cases in which the property of a judgment-debtor cannot be reached by the ordinary modes of execution and in which the appointment of a receiver would be necessary. When a receiver is appointed to carry on a business, the question whether he should be personally liable upon his contracts is one in regard to which the English and the American Courts differ. The American rule that a receiver's liability is confined to the assets on his hands appears to be the preferable one. It is desirable to declare that the parties should be at liberty to bring the receiver before the Court by petition and apply for any relief against him for misconduct or negligence in the discharge of his duties.

The Chapter on Arbitration is a distinct improvement upon the existing sections, and the provision for appeal contained in section 526-A will have the effect of obviating the hardships now felt in arbitration proceedings and encouraging a resort to arbitration. The language, however, of this section is far from happy and requires to be altered.

The amendments in section 539 with reference to suits relating to public charities are also of a useful character and should be extended to suits relating to any public property or right. It has been held that section 30 is not available for the assertion or enforcement of rights belonging to the public as opposed to a section of a community. Supposing, for instance, that there was an endowment for periodical musical entertainments to the public or for periodical scientific demonstrations, the endowment would hardly come within the description of charitable or religious endowments, and there would be no remedy in case of a breach of trust.

Passing on to the Chapter on Appeals, the principle embodied in S. 560, clause 3, is open to objection. Where an appeal lies from a preliminary decree, the party should not be bound to appeal against it at once, but should, as under the present practice, be allowed to take objection to it in any appeal from the final decree if he considers the latter course more expedient. It is not possible to determine by any hard and fast rule whether it will be cheaper and more expeditious to await the final decree and then prefer an appeal or to prefer an appeal at once against the preliminary decree and bring the points involved therein before the appellate Court before any decision has been passed upon the other questions in the case. A party may be fairly convinced that he has a valid ground of attack against the preliminary decree, but he may have a reasonable expectation that if the case is tried upon the merits, no decree will be passed against him. It may be cheaper and simpler for him to proceed to trial in the first court upon the issues not already disposed of, than to prefer an appeal and then to go before the first court in the event of his failing in the appeal. Which of these courses is more economical and advantageous is a matter which should be left to be decided by the party for himself according to his lights. And if the party comes to the conclusion that it is preferable for him to proceed to trial in the first court upon the remainder of the case, he should not be punished for a *bona fide* exercise of his judgment by a deprivation of the right of appeal upon the preliminary points. A provision like that contained in clause 3 will have the effect of compelling the parties invariably to prefer an appeal against a preliminary decree, even though they may have fair grounds for believing that they may succeed in the first court upon the other points.

In section 541 the provision that an appellant should not, except by leave of the court, be heard in support of any ground not taken and pressed in the court which passed the decree under appeal is mischievous. It is a matter of common observation that many points which escaped the attention of the practitioners in the lower courts are subsequently discovered by the practitioner in the appellate Court. It will be impossible to expect that cases should be conducted in the lower courts by practitioners of the same ability as those who practise before the higher courts. And even assuming that the practitioners will be of a uniform standard of ability, points which

may strike one practitioner may not occur to another though the latter cannot on that account be charged with any incompetence. There is no reason why a party should not be allowed to succeed upon a point which has been discovered for him by the skill of his advocate in the appellate Court, or why the successful party in the lower court should be allowed to retain an advantage which he could not have won but for the oversight or incompetence of his adversary's pleader. If the point which is newly raised is one which will require a further investigation on the facts before it can be disposed of, the Appellate Court will be justified on public grounds in refusing to entertain the point. And this is the practice which is sanctioned by the Judicial Committee. But when no further evidence is required with reference to the new ground of objection, the consideration that it may lead to a waste of public time has no application, and the court should be bound to decide the points. It may be said that the words "except by leave of the court" are a sufficient protection to the parties. But we know from experience that if the leave of the court is made necessary it is seldom likely to be granted as the appellate courts are generally anxious to get rid of the appeals before them with the least possible trouble. Difficulties will also be felt in deciding what points were pressed and what points were not pressed in the court below and in determining what degree of insistency is necessary to treat a point as pressed. The appellate courts are also likely to confound pleas with arguments and suppose that if a particular argument out of several which may be urged in support of the appeal has not been urged in the lower court, it should not be allowed to be advanced in the appellate court also. If it is necessary to retain S. 541, Cl. 4, sub-clause b, we would omit the words, 'and pressed' and add the words 'where such ground of objection involves any further investigation of fact.'

We think there is hardly any necessity for laying down any rules in regard to the exercise of the discretion of the appellate court in the matter of requiring security for costs from the appellant.

The provisions of S. 561 of the existing Code with reference to objections by the respondent are very defective. The amendments introduced in this section are both important, but we do not think they go far enough to remove the existing defects. The provision in the new clause 5 to the effect that the stage of

discontinuance or dismissal of the appeal shall not prevent the court from proceeding with the memorandum of objections is very useful. Clause 6 embodies a recent decision of the Calcutta High Court, but the question when the determination of a matter in controversy between the appellant and the respondent opens up questions between one respondent and another co-respondent or party to the suit is one which does not always admit of an easy answer. Nor do we see any reason why a memorandum of objections should ordinarily be limited to matters in controversy between him and the appellant. When an appeal is preferred the appellate Court should be deemed to be seized of the whole case and should be in a position to do full justice between the parties, provided, of course, due notice is given of all objections to the parties affected. A plaintiff who succeeds in the lower Court against some of several defendants may be content with his decree though he may have a valid ground of complaint against the portion of the decree disallowing his claim against the other defendants. But if the defendants against whom a decree has been passed prefer an appeal, there is a danger of the appellate Court reversing the decree of the lower Court in favour of the appellants and if the respondent is not allowed to raise an objection against the other defendants he may be left entirely without remedy, and there would be a serious miscarriage of justice. It is of no use to urge that the respondent might have preferred an independent appeal, for he might well have been satisfied with the decree against some of the defendants. The right of a respondent to prefer a memorandum of objections and the power of the appellate Court to do justice between all the parties to the suit should be regulated upon the same lines as laid down in Order 58, Rules 2 and 6 of the Rules of the Supreme Court in England. Rule 2 provides as follows:—

‘The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected. But the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding or of any person who is not a party and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just and may give such judgment and make such order as might have been given or made if the persons who served such notice had been originally parties, and any notice

of appeal may be amended at any time as the Court of Appeal may think fit.

Rule 6 provides "It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal. But if a respondent intends upon the hearing of the appeal to contend that the decision of the court below should be varied, he shall, within the time specified under the next rule or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal but may in the discretion of the court be ground for an adjournment of the appeal or for special order as to costs."

The provision in S. 574, Cl. 4 that where the appellate court concurs in the whole or part of the judgment of the lower Court it shall be sufficient to record such concurrence is bound to have a very unwholesome effect upon the lower appellate courts. It will offer a temptation to those courts to confirm the decrees appealed against with the object of avoiding the task of giving reasons for their judgment, which they would be obliged to do if they varied the decree of the court below. The lower appellate courts will consider themselves relieved of the duty of exercising any independent judgment upon the materials in the case. And it would be impossible for the High Court to ascertain whether the lower appellate Court has really taken the pains to understand the case and apply its mind to the contentions of the parties. S. 578A is an importation of the crude provisions of the Suits Valuation Act. The word 'or' at the end of clause A should be replaced by 'and,' for the net result of clauses 2 and 3 is that it is not enough that an objection has been taken to the jurisdiction of the courts below but that the objection should be well founded. We think also that the words, "that the over-valuation or under-valuation thereof has prejudicially affected the disposal of a suit or appeal on the merits" should be left out, unless a question of jurisdiction is necessarily to be regarded as a question going to the root of the case. We fail to see how the over-valuation or under-valuation of a suit can prejudicially affect the disposal of the suit or appeal on the merits.

Section 578A being merely a copy of the provision of the Suits Valuation Act VII of 1887, section 11, we may quote here with advantage the remarks made by us about that section in Vol. II, page 145 of this Journal. "If the suit or appeal is instituted in the right court no question arises. It is only if the institution is in the wrong court, that we have to consider the procedure of the court of first or second appeal. Now in such a case the objection as to jurisdiction (a) may, or (b) may not be raised at an early stage. And the error as to jurisdiction (1) may, or (2) may not, prejudicially affect the disposal of the case on the merits."

Now the section in spite of the appearance of great elaboration makes no suggestion with regard to (b) where the objection is not raised at an early stage, except that the objection may be *entertained* if the error has prejudicially affected the disposal. There is nothing said as to what the court is to do after entertaining the objection.

Where the objection is (a) taken at an early stage the cases are divisible according as the error (1) has or (2) has not prejudicially affected the disposal. If the error has not prejudiced the disposal, the objection goes for nothing, at any rate when there are sufficient materials on record for disposal by the higher court. In the absence of sufficient materials, we are not told to which court the case is to be remanded or issues are to be sent. If the error has prejudiced the disposal on the merits by the wrong court, and the materials on record are sufficient for the higher court, we are not told what that court is to do. But if they are insufficient, the court is asked to deal with the case according to the rules applicable to the court with respect to the hearing of appeals, by which it is not clear what the section is intended to lay down. If the higher court remands the case or refers issues for trial, the case is to be sent to the proper court. A more unintelligible medley it is perhaps not easy to conceive. We have attempted to state the rules with greater clearness than the section does.

Let us examine it a little more minutely. The *factum* of institution in the wrong court by reason of over-valuation or under-valuation is the very basis of the whole section. It is difficult to understand why it should be repeated in 3 paragraphs of the section that the court should be satisfied that the suit or appeal

was over-valued or under-valued. Again Cl. (a) states that the objection should have been taken at the first hearing or in the memorandum of appeal. It is absurd to speak of the objection to the institution of the appeal in the wrong court being taken in the memorandum of appeal. The objection in the memorandum of appeal must mean the objection to the institution of the suit in the wrong court. It is difficult to see why Cl. (a) should require the objection to the institution of the suit to be raised before the first hearing, if with equal advantage it may also be raised in the memorandum of appeal for the first time. We have next the statement in Cl. (b) that the over-valuation or under-valuation should have prejudicially affected the disposal of the case on the merits. Now what does this mean? The mere defect of jurisdiction is not the prejudicially affecting of the disposal on the merits. What had the legislator in his mind in speaking of over-valuation, etc., prejudicially affecting the merits? We confess it beats us. We then turn to Cl. 2 and are met by the question, the objection having been in proper time and the error not having prejudiced the disposal, what is the appellate court to do if there are not sufficient materials for determination of the other grounds of appeal? Is the appellate court to remand the case to the right or to the wrong court? Again looking at Cl. 3 we are staggered by the direction that when the objection is in time, and the error has prejudiced the disposal on the merits and there are not sufficient materials for disposal of the other grounds of appeal, the court shall deal with the appeal under the rules relating to appeals in a mode (difficult to be realized) but apparently different from the modes referred to in the subsequent part of the clause, as remand, etc.

We think we have said enough to show that a more clumsy legislation can hardly be conceived. We are not prepared to approve of the soundness of the policy of this legislation. If the wrong court in which the suit or appeal is instituted has overruled the objection, it is practically of no further avail. The rigmarole contained in the various paragraphs of the section amounts to little more. It appears to us that apart from want of simplicity we can charge against the section that it is out of harmony with other legislation now in force. S. 15 of the Civil Procedure Code and Ss. 12 and 13 of the Madras Civil Courts Act are still in force. And S. 13, C. C. P., enacts that the determination of an issue in a

prior suit between the same parties, etc., is not *res-judicata* in a subsequent suit which the former Court had not jurisdiction to try. Are we to allow the force of *res-judicata* to the prior decision where the defect of jurisdiction has been condoned in the way prescribed by S. 11 of the Suits Valuation Act?

We have only taken this section as an instance of the weakness of the legal element in the Legislative Council. Is there any prospect of improvement?"

In S. 579 B, the words 'or by any court of intermediate appeal' and the words 'or of intermediate appeal' occurring in the proviso are inappropriate as the Chapter deals only with first appeals and S. 587 extends the procedure in appeals to second appeals.

The Chapter on Second Appeals is one of the most important in the new Bill and introduces changes of a very mischievous and re-actionary character. There is no other part of the Bill which has met with such wide and severe condemnation as the proposals to curtail the right of second appeal. The mistake committed by the framer of the Bill consists in supposing that the importance of a case to the parties is to be measured by the pecuniary valuation of the subject-matter. Nor do we think that there is any justification for the provision that a security should be invariably demanded when the decrees of the courts below are concurrent. The importance of the subject requires more space than we can spare in this article and we shall for the present content ourselves with reference to our remarks upon certain tentative proposals which had been put forward in the year 1900 to restrict second appeals. (See 10 M. L. J. 353). It is necessary that the High Court should be invested with the power of entertaining a review in Second Appeals on the ground of discovery of fresh evidence and calling for a finding from the lower appellate Court with reference to such evidence. The absence of such a power under the existing Code has led to serious hardship in several cases. S. 591 makes it imperative upon a party to appeal then and there from any interlocutory order from which an appeal is provided. The policy of this section is open to the same objections that we pointed out with reference to the provisions of Cl. 3 of S. 540.

THE MADRAS IMPARTIBLE ESTATES ACT.

The observation of Sir C. P. Ilbert (*Legislative Methods and Forms*, p. 152) that, "It is easy enough to pass laws for India—the difficulty is in making them work. They are apt to remain for an indefinite time in the air, and when they touch the earth, they operate in unexpected fashions" received a characteristic illustration in the manner in which the Madras Impartible Estates Act was passed into law by the Local Legislative Council at its last session. A more striking instance of the Legislative body being made subservient to the Executive Government, and of what has been termed 'Legislation by mandate,' in its worst form, in regard to Indian Laws, cannot be conceived. The Legislative Council had set down for consideration at its meeting of the 2nd June 1902, the introduction of the Impartible Estates Bill, No. 1 of 1902, its being referred to a Select Committee for report, the introduction of the Impartible Estates Suspensory Bill No. 2 of 1902, and the taking of the same into consideration suspending on account thereof Rules Nos. 34 and 46, for the conduct of business. When the Council met, however, on the 2nd June, His Excellency the Governor announced his intention, in exercise of the power which he had as President, to alter considerably the procedure which was notified in the orders of the day, and in explanation of his action said, "You are aware that objections have been publicly taken to the Suspensory Bill, not only in respect of its several provisions, but also to the whole Bill, as a method of dealing with the situation which necessitates immediate legislation. My colleagues and I, on considering the criticisms, came to the conclusion that it was expedient to alter the Suspensory Bill, and accordingly we asked the Government of India to assent to the addition of a provision for making the scheduled estates impartible as well as inalienable. The Government of India in a telegram which we received only yesterday afternoon, objected to our proposal, but suggested as a way out of the difficulty, that the main Bill should be passed at once as a temporary measure, having effect for the limited period of six months or twelve months only, unless in the meantime a confirmatory Bill should, on further consideration, be passed into law. We have gladly accepted this proposal, as it is more in accordance with

the views which we have entertained for some time past, than the procedure which is contemplated in the notice paper." In accordance with this declaration, the Suspensory Bill was dropped, and the main Bill with certain amendments suggested on the spur of the moment, was passed into law, the other rules regulating the course of all Bills prior to their being passed into law, being suspended for the occasion by resolutions of the Council. Thus no notice whatever had been given to the members of the Council, previous to the meeting, of the course of procedure which was adopted, and of the particular piece of legislation which was actually passed into law. To the Hon'ble Members of the Council who were absent from the meeting, and to the public in general, the proceedings of the Council when published, came as a surprise. The object of the Rules as to giving previous notice of the subjects to be taken up for consideration in a meeting, referring a Bill to a Select Committee for report and allowing a sufficient interval of time before the subject is taken up for final consideration, is to provide statutory safeguards against hasty and ill-considered legislation, and it is clear that such constitutional checks ought not to be taken away except on grave and sudden emergencies. Exceptional powers are conferred for use on exceptional occasions. No great and overwhelming necessity has been shown to exist in the present instance, sufficient to justify the suspension of the ordinary course of procedure. On the other hand, as the Hon'ble Member in charge of the Bill admitted, that the Madras Government, as constituted in 1893, refused to recognize the justice or expediency of this legislation, shows that there is no ground whatever for being dogmatical about the necessity or utility of it. That the Local Legislative Council has no independence of deliberation or action, and that it exists simply as a machine to register the decrees of the Supreme Government and to pass them into law, is further clear from the statement of the Hon'ble Member in charge of the Bill as regards the most important provision in the Act. In proposing that section 3 of the Bill, as regards impartiality and inalienability of the estates named in the Schedule, be passed into law, the Hon'ble Mr. Thomson said, "I would deprecate argument on this particular section for the reason that the Hon'ble Mr. Jambulingam Mudaliar has advanced. The section has been passed by the Government of India, and it has

been passed in this particular form, and if you are to alter it in any manner, we are likely to come to grief. I therefore trust that the Hon'ble Members will take the section as it stands." The section as it stood was then passed, although in the language of the Hon'ble Member above referred to, it required very careful recasting and he had "no hesitation in saying that the volume of litigation will be quadrupled, if it is permanently to remain the law of the country." In the book on *Legislative Methods and Forms*, already referred to Sir C. P. Ilbert says, "Englishmen have a deep-seated distrust of official discretion, a deep-seated scepticism about bureaucratic wisdom * * * *. The ordinary Englishman, if his liberty of action is to be subjected to restraint, prefers that that restraint should be imposed by laws, which have been made after public discussion in a representative assembly." The time seems indeed to be very remote when this principle, which is an accepted commonplace in English domestic politics, will be applied in the practical government of this country. It is impossible to omit reference in this connection to the attitude of two of the non-official elected members of the Council. When the Hon'ble Mr. Thomson proposed that the estates named in the schedule to the Bill, should be subjected to the operation of the proposed law, two of the elected representatives of the people in the Council were apparently so much impressed that the new law was the acme of human wisdom, that they proposed to empower the Local Government, to include such other estates in the schedule as they may consider it desirable so to include, by a notification in the Gazette. His Excellency the President remarked that the Hon'ble Members were proposing to invest the Government with arbitrary powers, and on the Government opposing the proposal, it was rejected. The degree of mental equipment which qualifies one to be a member representing the people in the Legislative Council cannot be very high, when it can admit of such a total want of perception of the fundamental differences between the executive acts of Government and acts of legislation, in the mode in which they are framed, and in their ulterior effects on the well-being of the community at large.

Now to turn to the merits of the enactment which has been passed, which, though it is to be in operation for one year only, is yet the avowed precursor of a law which is to be a permanent

addition to the Statute Book, the chief ground upon which this legislation has been undertaken, is that "the highest political expediency requires that these ancient estates should not be dismembered." It is stated that the existence of a landed aristocracy, is an important factor in the economic condition of the country; that a class of wealthy landowners have opportunities of introducing reforms in agriculture and of being centres of social influence and enlightenment, which will tend to the advantage and improvement of the smaller landholders, and that the present class of Zemindars is tending to dismemberment and decay, by the existing state of the law, brought about by judicial decisions which permits of unrestricted alienation by the holder of a Zemindari, and the system of equal division among his sons on his death. The first question that has to be considered then is, whether a system of property in land according to which impartibility, succession by primogeniture and inalienability are the leading incidents, is in the interests of the general public, preferable to that under which partibility, free disposal and equal succession are the main features. One of the commonest grounds alleged for the low state of agriculture in this country, and the poverty of the Indian peasants is the sub-division of land, as a result of the Hindu Law of Inheritance. To test the soundness of this argument, it may be useful briefly to refer to the system of land laws in other countries. According to the French law, by article 745 of the Code Napoleon, the equal distribution of the property of a deceased man among his children, without distinction of age or sex, is provided for. A father can dispose as he likes, of one-fourth of his property, if he has three or more children (or any one or more of them having died leaving descendants). He can dispose of one-third if he has two children (or they have left descendants). Of one-half if there is only one child or his or her descendants. If there are no children, but relations on the father's and mother's side, he cannot alienate more than a third. If he leaves relations on one side only, he can dispose of three-fourths. Mr. T. E. Cliffe Leslie writing on the land system of France, in the Cobden Club essays, after examining the subject fully says, "The sub-division of the French soil which has been the subject of sincere regret and pity on the part of many English writers and speakers, as well as much ignorant contempt on the part of prejudiced politicians, is really both a cause and an

effect of the increased wealth of every class of the population, the seller and buyer of land, the land-owner, the farmer, and the labourer, the country and the town. Instead of being, as has been supposed, a cause of low wages, it has been a consequence of high wages, which have enabled the labourer to become a land-buyer. * * *. Instead of diminishing agricultural capital, as many English agriculturists urge, it is in the language of Adam Smith, both cause and effect of the frugality and good conduct, the uniform constant and uninterrupted effort of every man to better his own condition, from which public as well as private opulence is derived, and which is frequently powerful enough to maintain the natural tendency of things towards improvement, in spite both of the extravagance of Government and the greatest errors of administration."

In Germany, if a man dies intestate, the law is that the whole of his property, is to be equally divided among his widow and children. If he makes a will he is obliged to leave every child a fixed fraction of what the child would have received had he (the testator) died intestate.

In Russia, legal usage regulates the descent of peasant properties. The law of intestacy for the rest of the community is based on equal division, giving males a preference over females.

In the United States of America, an owner of land has got complete power of disposition, and the prevailing law of intestate succession is equal division, and it is stated that this principle has become so much ingrained by long prescription, that a feeling of injustice has grown up throughout the states, against a testator who does not devise his property equally among his children. To the same effect is the law in Canada and the islands of Jersey and Guernsey.

Switzerland, Austria, Holland, Belgium, Norway, and a great part of Italy have the same land laws as France. The lands in these countries are subject to the same system of sub-division on an owner's death, and are cultivated by small yeomen farmers and peasant proprietors. M. DeLevergue whom Mr. Cobden described as "one of the most accomplished, laborious and conscientious writers on agriculture in the present age," was of opinion, that "It is of the highest public interest in the first place, that landed property should easily get into those hands by which it can be

turned to the best account, secondly, that the title to property in land should be secure, and incontestable, and thirdly, that there should be no legal obstacles to the sub-division of land when the natural economy tends to it, so that the number of small land-holders should not be artificially reduced by imperfection in the law."

As regards Japan, which stands in the vanguard of civilization at the present day, Count M. Matsukata, formerly Prime Minister of Japan in an article in the *North American Review* on the Financial system of Japan, says, "The land tax reform confirming the most important form of private property was the greatest legislative measure. The salient features of the new system are (1) the proprietary right of private persons over land was recognised and confirmed, (2) restrictions on the people's right over their landed estates were taken away, and (3) an official assessment of the value of land was made.

In England, succession by primogeniture is the common law of English landed property. Money and other personal property are divided in fixed proportions among the intestate's surviving children or relatives according to the Statute of Distributions (22 23 Car. II. C. 10. 1 Jac. II. C. 17). Sir Frederick Pollock says "The prevalence of settlements and the complete freedom of will that has existed since the Restoration, have caused this whole head of the law to sink into comparative insignificance. Nevertheless, proposals have from time to time been made to change our unique law of inheritance as regards land, by assimilating it to the law of succession of personal property, which is substantially the same as the Roman law in its final form, and the present law of the rest of Europe. Throughout the States and Colonies which took their law from England, this change has already been generally made." In 1859, Mr. Locke King introduced in Parliament, a 'Real Estate Intestate Bill', the object of which was stated to be, to regulate the devolution of realty on intestacy, in the same way as is provided by the Statutes of Distribution for personalty. The Bill was rejected on the second reading. Another attempt made in 1866 also failed, Mr. Gladstone as Chancellor of the Exchequer opposing it. In 1869, Mr. Locke King again introduced it, and the Bill was read a second time being supported on that occasion by Mr. Gladstone and the Solicitor-General Lord Coleridge. The advanced state of the session

rendered it necessary however to withdraw the bill. In 1876 and 1878 similar Bills were introduced in the House of Commons, but were unsuccessful. In 1888—1889, a land transfer Bill was introduced into the House of Lords by Lord Halsbury, and in the discussions which took place on the occasion, Lord Selborne and Lord Herschell supported the principle of equal division of landed property. The Bill was not however proceeded with. In 1893 and 1894, Lord Herschell brought forward a Bill called "Law of Inheritance Amendment Bill" which sought the assimilation of the law of succession to real and personal property, which also shared the same fate as its predecessors (Cecil on Primogeniture).

It must be remembered that, in England, one strong bulwark of the principle of primogeniture is the House of Lords, a constituent part of the constitution, composed of hereditary peers who are naturally interested in the maintenance of this principle. Notwithstanding this great impediment, and the large testamentary power which reduces in practice to the narrowest compass, the right of primogeniture, "a right," as described by Adam Smith "which, in order to enrich one, beggars all the rest of the family," it is clear from the foregoing facts, how earnest and strenuous have been the endeavours made by eminent men in England, to bring the English law of inheritance, into conformity with the laws of most of the other nations of the civilised world. Partibility and equal succession sanctioned by the Hindu Law, have thus come to be recognised as necessary incidents, in most modern systems of landed property, and for the betterment of the country and for its economic improvement, our reformers must look elsewhere for the real remedies.

It is alleged that the preservation of the Zemindaries by means of the present legislation, will conduce to agricultural improvement. Sir George Campbell speaking of the Zemindars in Bengal many years ago said, "to expect of the Zemindars, the duties of an English landlord, to build and plant and introduce improved agriculture and improved machinery, if it ever was expected, was a chimera."

The Honourable Mr. Eardley Norton, said in the Legislative Council that, "personally, I am not in a position to admit, so far as my experience of these gentlemen is concerned, that the body

of Madras Zemindars is worth preserving." The Madras Government itself in 1893, after observing that "the past history of the Madras Zemindars does not encourage the hope that agricultural interests would be in any way benefited by their maintenance. As to their being leaders of society, it does not appear that, as a class, they have yet done anything to deserve to be regarded as possible promoters of any desirable social reform," recorded its solemn conviction that, "the breaking up of large estates which it is now desired to check, may be contemplated with complacency."

Even as regards English landlords owning estates under strict settlements which may be said to correspond in substance with the principle of inalienability embodied in the Impartible Estates Act, Sir Frederick Pollock says, "There is a still graver economical objection to strict settlements, than any real or supposed want of power to deal with the land. It is, that they destroy the ordinary means and motives of an owner, for dealing with it in the way of improvement. The life tenant of a settled estate, 'limited owner' as he is expressively called, seldom has any capital to put into the land. Incumbrances created by previous settlements, commonly leave no margin of revenue beyond what is needed for barely keeping up the estate. And if the limited owner has other means, he is still without much inducement to apply them to the improvement of the estate. If he does so, he spends for the exclusive benefit of an eldest son, who is already preferred by the settlement. He is much more likely to use his money for the benefit of younger children. And justly, so far as they and he are concerned, but this divorce of capital from land is a loss to the land itself, to the cultivator, and in the long run, to the commonwealth." The above observations will apply, word for word, to the class of Zemindars affected by the operation of the new Act. In a learned and exhaustive essay on primogeniture in England (Cobden Club Series), the Hon'ble G. C. Brodrick, thus sums up his conclusions on the subject. He says that the system must be condemned :—

- (a) *Politically*, as aggravating the perilous dualism of town and country, as affording the very minimum of constitutional stability to be derived from the conservative instincts of proprietorship.

- (b) *Socially*, because it helps to stereotype the caste-like organization of English classes in horizontal layers.
- (c) *Economically*, because it cramps the free play of economical laws in dealings with land, and discourages a far-sighted application of capital to agriculture.
- (d) *Morally*, because it holds out to almost every eldest son, the assurance of wealth and power, whether he be worthy of it or not, and subject to no condition but that of surviving his father.
- (e) *Lastly in the interest of family government*, because it fatally weakens the authority of parents over eldest sons, and introduces a degree of inequality into the relations of children brought up together, which often mars the cordialty of their intercourse in after-life.

It is very remarkable that when the trend of modern economic thought, all the civilized world over, is towards encouraging the free dispersion of land, and breaking the fetters by which free alienation and ownership are restricted, so as to give wide scope for the commercial and industrial activities among the people, the tendency of legislation in India is in the opposite direction, seeking to enchain rights and liberties in the disposition of landed property, where none existed before. A conspicuous example of this, is to be found in the Punjab Land Alienation Act, which is confined in its operation to the smaller land-holders. The Bombay Land Revenue Code Amendment Act (No. IV of 1901), is another instalment of legislation on the same principle. The Madras Court of Wards Act I of 1902, has placed the Government *in loco parentis* as regards owners of large landed estates, who will, under its provisions remain in perpetual pupillage, as regards the administration of their properties. The Madras Impartible Estates Act goes a good deal further on the same lines, and, as has been said of the English system of primogeniture and family entails, helps, "to establish in the centre of the family, a magnificently fed and coloured drone, the incarnation of wealth and social dignity." It is difficult to understand why the Indian Government which moves the hand of the Indian Legislature,

should thus systematically ignore the teachings of history, and the example of other countries, and try to set back the clock of time. Mr. Sedgwick says (*Elements of Politics*, page 372) that "Legislation (and other Governmental interference) in modern civilized societies, is mainly based on the principle that the interests of the same adult members of the community will be best promoted if they are left to provide for themselves." It may be true that the most wholesome of national and economical organizations is that which admits of large and small estates, and every intermediate proportion. Nothing but evil can ensue, however, in forcing artificial results through the agency of a subservient legislature. There are already several large estates to which the incidents of impartibility and inalienability are annexed by law by virtue of long usage. It is not stated that the additions made by the new Act are in consequence of the possessors of them having any exceptional claims to special treatment, on account of ancient noble lineage, or of noteworthy public services rendered by them or their ancestors. The Hon'ble Mr. Thomson says, "It will be understood that this legislation is proposed as founded on simple justice to the class to which it is intended to be applied." It is by no means easy to follow the Hon'ble Member in the train of reasoning which leads him to this conclusion. So perhaps it has to be taken as 'understood.' When speaking of simple justice to the class, is it not overlooked that the class can include only the eldest sons of Zemindars, and that the far greater number of younger sons who belong to the same class, and who by the new law, are deprived of their rights of inheritance and equal succession, have their claims to simple justice denied altogether. In an eloquent speech, advocating the abolition of the law of primogeniture in England, the late Mr. John Bright said, "Suppose a man has got money in the bank, suppose he has machinery in his mill, merchandise in his warehouse, ships upon the ocean, or that he has shares or parchments for them in his safe, if he dies without making a distribution of it by will, the law makes a distribution of all that property amongst all his children, in accordance with the great universal law of natural parental affection and justice. The property which is land is not divided equally, but is given to the eldest son in one lump. Now, tell me, whether the principle which the law of Europe for the most part wishes

to enforce, that which the law of America enforces when there is no will, that which we enforce when land is not in question, whether that is not a more just law, does not approve itself to the hearts of men, and before the eye of Heaven, than a law by which we send beggars into the world—it may be, half a dozen children, that we may make one rich in the possession of unnecessary abundance.”

On the score of justice, then, it is impossible to justify the imposition of the new law. The Hon'ble Mr. Thomson also stated that “This Government is of opinion that the highest political expediency requires that these ancient estates should not be dismembered.” It is not explained what is the nature and scope of the political expediency referred to here. As has been pointed out before, the Government seems to be anxious to perpetuate the estates enumerated in the schedule, not out of any consideration for their present possessors or their ancestors, but because large aced domains are an essential factor in the social fabric. The prevalent opinion in the United States which has helped to fashion the land laws of that country seems to be, that sub-division of land conduces to political as well as social order, because the greater the number of the proprietors, the greater is the respect shown to property, and a proprietor of land however small, acquires a stake in the country, and assumes responsibilities which guarantee his discharging faithfully his duties as a citizen. Viewed from any standpoint, the present legislation must be pronounced to be of an entirely re-actionary character, or putting it at the lowest, it is but a leap in the darkness of experimental legislation. To analogies drawn from the experience and cultivated intelligence of foreign countries, it is not enough merely to say, as the Honourable Mr. Thomson says, that “the conditions of India and of England are essentially different in respect of landholding and uses.” It must be further shown in what respects they differ, and how the proposed legislation which embodies a worn-out and exploded principle in England and other countries, can serve as a nostrum to cure the diseased Indian body politic. Mr. Bryce says (*Studies in History and Jurisprudence*, Vol. II, p. 315): “In the field of legislation, the danger of doing too much is a serious danger, not only because the chances of error are manifold, but because the law ought to undergo as few bold and sudden changes

as possible. The natural process whereby the new circumstances, new conditions, new commercial and social relations, that are always springing up become recognised in custom, and dealt with by juridical science before direct legislation impresses a definite form upon the rules that are to fix them—this process is the best, and indeed the only way by which a nation can create a refined and harmonious legal system.”

One of the arguments put forward by the Honourable Mr. Thomson to support the present legislation is that “the members of the Madras Landholders’ Association have looked beyond themselves, and apprehending calamity to their family estates and influence from the present state of the law and the uncertainty that must wait upon its application, have requested that the ancient Zemindaries be declared impartible and inalienable by the statute law.” As to this, it may be pertinent to point out that the members of the Landholders’ Association cannot by any means be considered to be disinterested in the result of the agitation set on foot by them, for the proposed legislation gives them the rights of a privileged class, and in individual cases, will be of great potency in averting threatened immediate danger, as in the case of the Rajah of Venkatagiri, the President of the Association, against whom a suit for partition of the Zemindari is pending in the High Court. Indeed, one of the obnoxious features of the present legislation is, that it interferes with vested rights—rights which in some cases have been affirmed by decrees of court, and in others, are in process of being adjudicated upon by the judicial tribunals. The feelings of hardship and of insecurity which it thereby engenders are much to be deprecated. As regards pending suits, which were instituted on the basis of the law prevailing at the time of their institution, and the hardship caused to the parties in consequence of the new legislation, it was stated on behalf of the Government, that this legislation has been “in incubation for several years,” and, “that parties who have spent large sums of money for the purpose of securing partition, entered into such litigation with their eyes open,” and therefore, deserve no consideration. It is difficult to see how this ground can be maintained with any show of reason. So recently as 1893, the Madras Government in a carefully considered resolution, rejected the proposal for the present legislation, and changes in the personnel of

the Government are, to the general public in this country not indications of change of policy or principle in acts of administration. No public intimation was given that the present legislation was contemplated, and even the parties most immediately interested, viz., the younger members and other relations in the family owning the estates enumerated in the schedule, were not given notice, and had no opportunity whatever of showing cause against the proposed legislation. What estates were or were not to be included in the schedule, was a matter determined entirely by the Executive officers of Government, and the seal of legislation is affixed upon their *ipse dixit*. The question of hardship and injustice, however, is one, not merely relating to those individuals who have launched into litigation to enforce their right to partition and have expended monies in that behalf, but of all those who by birth, and by the expectations fostered by the existing state of the law, have been looking forward to obtaining their rights of inheritance in the natural course of things.

A learned writer has stated that, "if the Code Napoleon had been introduced into England, and if the descent by primogeniture were afterwards substituted for it, the generation of younger sons affected by the change would have good cause for complaint, unless their interests were expressly reserved. Again, if a father had led his children to count upon an equal division of his property, and were then to accumulate all upon the eldest son, a palpable wrong would be done to all the rest." (Systems of Land Tenure, p. 141). The principle prohibiting *ex post facto* legislation is so supreme and axiomatic, that it forms one of the Articles of the American constitution. Mr. Sedgwick (Elements of Politics, p. 566) says that the constitutional rules which it is expedient to render unalterable by the ordinary Legislature are, (1) the rule that no legislative proposal be passed until after it has been considered a certain number of times, and (2) the rule prohibiting *ex post facto* legislation. It has been shown that both these rules, which are founded upon cardinal principles of justice, have been violated by the local Legislature in enacting the Impartible Estates Act.

It is unnecessary on this occasion to give any detailed consideration to the provisions of the new Act, as it is confessedly in a crude form, as its life is short, and a more mature production, from the Legislative Council has been promised at an early date.

How ill-conceived and eccentric some of the provisions of the Act are, will be clear from the wording of Section 3, which says that every proprietor of the estate named in the schedule shall be restricted from alienating his estate, except in circumstances where alienation would be permissible by law, if the estate were ancestral property, and the proprietor occupied the position of managing member of a joint Hindu family governed by the ordinary law of succession. The effect of this is, that even where an estate is owned by a Muhammadan or Christian, his action is to be regulated by the same law of alienation, that governs the Hindu manager of an undivided family. That law itself cannot be said to be uniform, it is more or less in a nebulous condition, being subject to the fluctuations of judicial opinion. Besides, the circumstances and conditions under which alienations may be made by a Hindu manager, are closely connected with the religious beliefs and the social habits of the Hindu section of the community, and it is extraordinary fatuity to prescribe that the same principles shall determine the conduct of Mussalman or Christian proprietors of estates. The wording of section 3 makes it applicable to voluntary alienations only. How is the principle of prohibition which it lays down, to be worked with reference to the pious obligation of the son of a Hindu father to pay the debts of the latter? When a Hindu proprietor dies, leaving debts, and his eldest son succeeds to the estate, is the son bound to discharge the debts by alienating if need be, portions of the estate, or can a creditor of the father obtain a decree against the son and make the estate in his hands liable to satisfy the debt, as he is entitled to do under the ordinary Hindu Law? If the son can make a valid alienation in the circumstances stated, or a creditor can enforce it by decree of court, the object of the present legislation would be entirely frustrated. There is nothing in the Act to show how the religious obligation of the son to pay his father's debts out of ancestral property, is to be maintained in harmony with the principle of keeping the integrity of the family estate intact, on the ground of 'political expediency.' It is also remarkable that the question as regards the mode of descent of the properties enumerated in the schedule, after the lifetime of the present possessors, is not touched by the Act. Impartible estates necessarily descend to a single heir, and it has been held that ordinarily the rule of primogeniture is the law of succession appli-

cable to impartible estates, but that the custom of the family may show a particular ground of preference. Mr. Mayne says that "when the single heir who is entitled to impartible property has been ascertained, the next question is as to the line of devolution in succeeding generations." And the learned author (*Hindu Law* Ss. 542—546) points out and discusses, in how many different forms the question has arisen, what conflicting authorities exist on the matter, and lays down certain rules which may be found "to reconcile all the cases." There is a bewildering variety of cases cropping up in connection with this subject of the devolution of impartible property *viz.*, cases arising out of plurality of marriages, of adoption, and cases in which arise the question whether lineal or ordinary primogeniture is to govern the rule of descent, and so forth. The framers of the Act seem to have been utterly oblivious of all these matters. One of the professed objects of the present legislation is the prevention of ruinous and vexatious litigation in connection with Zemindari properties. "The main purposes of a Code", says Professor Amos (*Science of jurisprudence*, p. 478), "are to impart into the national system of law, a greater Accessibility, Definiteness, Formal Organization and Compendious Brevity." The Judicial Committee of the Privy Council have laid down in a recent case (*Gokul Mandar v. Pudmanund Singh*) that, "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law." Viewed in the light of these principles, the Madras Impartible Estates Act must be considered to be a most defective and fragmentary legislation.

Section 4 of the Act says that "This Act shall not apply to portions of estates included in the schedule which have before the coming into force of this Act, been permanently transferred from the registered proprietors, either by court-sale or voluntary alienation." Supposing, however, that cases arise, as it seems likely they will, where portions of such estates have not been actually transferred, but the proprietors have entered into binding contracts to transfer them, how are the rights of the proposed transferees and the liabilities under the contract of the registered proprietors to be dealt with?

Clause (b) of Section 4, says that the Act is not to apply to "portions of such estates which may be permanently alienated

or transferred in future, in the exercise of the restricted powers recognised in section 3." This provision was explained by the Hon'ble Mr. G. S. Forbes in the Legislative Council, to mean that, "the intention of the section is, that if only a portion of an estate is alienated, the Act shall not apply to such portion, which shall not be impressed with the condition of impartibility as long as the corpus remains. Of course if the whole corpus is transferred, this Act does apply. I do not suppose that it matters much as to who the actual proprietors are." This not very luminous exposition of the new law, does not explain what is to be deemed to be the corpus of an estate, supposing three-fourths, or seven-eighths of an estate is alienated, whether it is the alienated portion which forms the larger bulk, or the remaining insignificant fraction. Nor is it clear upon what principle the incidents of impartibility and inalienability, are made to attach to an estate, when it is transferred as a whole, and it is provided that the Act shall not apply to a lawful alienation of $\frac{3}{4}$ th, or even a larger portion of such an estate. This provision must inevitably bring down the market price of estates when they are sold in the aggregate, for no intending purchaser can be expected to give adequate value to a property, which is clogged with the restrictions and fetters as to alienation and succession imposed by the Act. The best thing that can be said in its favour is, that it will practically be inoperative and innocuous, since it is liable to be easily evaded and set at naught.

S. KASTURIRANGA AIYANGAR.

NOTES OF INDIAN CASES.

Boisogomoff v. Nahapiet Jute Company—I. L. R., 29 C. 323:—

The decision in this case is obviously convenient. Where a purchaser of goods sues for damages for a breach of warranty as to quality and the goods are bulky, it is impossible to expect a proof of the inferiority of quality with regard to every portion of the goods. The result of an examination of a fair number of samples from different portions of the bulk was held to be sufficient to presume inferiority of the whole.

Mohesh Chunder Dhal v. Satrugan Dhal—I. L. R., 29 C. 343:—In this case, is raised the question whether the succession to an impartible Raj was to be governed by the custom of lineal

primogeniture or not. Though the decision was based upon the evidence of custom in the particular family, there are observations of their Lordships of the Judicial Committee, indicating the view which they may probably be inclined to take as a matter of law whenever the question should again arise. The contention on the part of the respondent was that in the absence of custom, lineal primogeniture must be held to be the rule even in case of collateral relationship. Their Lordships were apparently disposed to accept this view. The fact that a grandson whose father is dead succeeds to the grandfather's estate in preference to a surviving uncle, was considered by their Lordships to have an important bearing on the question. As between the grandson and the surviving uncle, if they are both members of an undivided family, the grandson would be entitled by right of representation to stand in the shoes of his father and as his father was the senior brother, the grandson would be entitled to succeed apart from any question of lineal primogeniture. The succession, therefore, of a grandson, would not be sufficient to establish the point. The observation of their Lordships that there is no instance of a collateral relation in a junior line, nearer in degree, being preferred to the descendant of an elder line shows that, in their opinion, the burden of proving that the custom of primogeniture does not include lineal primogeniture is upon those who assert it. So far as an undivided family is concerned, it has been held in Madras that when the succession passes from one line by survivorship to a collateral line in the undivided family, the rule of lineal primogeniture has been held to obtain and it has been held that the succession devolves upon the nearest heir in the senior line and not upon the nearest in blood. See *Naraganti v. Venkatchelapathi*¹ and the *Udayarpalayam case*² But does the same rule apply in the case of a divided family? It may be suggested that the same principle should be applied by analogy. But, in the case of an undivided family, the conclusion is reached by the doctrine of representation rather than by the rule of lineal primogeniture. The application of the doctrine in the case of a divided family where the question is which of several collaterals should succeed is beset with difficulties. If the senior line is to be exhausted, how far down or above, should we go before passing to a junior line? Is the tenth in descent from a senior branch to be

1. I. L. R., 4 M. 250.

2. I. L. R., 24 M. 562.

preferred to the fifth or sixth in a junior branch? The same difficulty does not exist in the case of an undivided family, for the coparcenary cannot at any time comprise more than four generations. In the *Tipperah case*¹ where title by survivorship was held inapplicable, nearness of kin and religious efficacy were the grounds upon which succession was determined. The principle of the *Tipperah case* would seem to be opposed to the principle of lineal primogeniture. As pointed out by *Muttusamy Aiyar, J.* in *Subrahmanya Pandya Chokka Talavar v. Siva Subrahmanya Pillai*² the only modification of the Mitakshara Law which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property, if it were partible under the ordinary Hindu Law.

Doyal Krishna Naskar v. Amrita Lal Das—I. L. R., 29 C. 370 :—We are disposed to agree with the view of Mr. Justice *Bannerjee* rather than with that of the *Chief Justice*. The considerations which apply to an execution sale are entirely different from those applicable to a private sale. We do not think that a purchaser at an execution sale can claim compensation from the decree-holder for any deficiency in the extent of land purchased, in the absence of any fraud on the part of the decree-holder. But even supposing that a purchaser can claim compensation for an innocent mis-description, Mr. Justice *Bannerjee* is clearly right in holding that he is bound to prove loss and cannot claim a proportionate reduction of the price, without any proof of loss. Assuming for the sake of hypothesis that the purchaser can claim compensation, the question arises whether he can claim it from the decree-holder or the judgment-debtor. If the decree-holder has received the whole of the purchase money, he should, on this view, be liable to refund. But if the judgment-debtor has received any portion of the surplus, the refund should, in the first instance, be ordered against the decree-holder from the balance, if any.

Nund Kishore Lal v. Kanee Ram Tewary—I. L. R., 29 C. 355 :—The decision in *Brahmadeo Narayan v. Harjan Singh*³ that the interest of a Hindu reversioner expectant upon the death of a Hindu widow could be the subject of alienation, was clearly opposed to the terms of clause (a) of section 6 of the Transfer

1. 12 M. I. A. 523.

2. I. L. R., 17 M. 316.

I. L. R., 25 C. 778

of Property Act. The Learned Judges are also right in holding that it is overruled by the decision of the Privy Council in *Shree Sunder Lal v. Acchan Kumari*.

Jamsetji N. Tata v. Kashinath—I. L. R., 26 B. 326:—If a Hindu father has actually sold away ancestral lands to discharge his own debts, his sons cannot impeach it unless they can show that the debts were illegal or immoral. But the court will not lend its aid as against the sons in a suit for specific performance of an agreement by the father to sell for debts which, though not illegal or immoral, were not properly incurred for the benefit or necessities of the family. In the case under notice, the plaintiff who sued for specific performance was in even a worse position, for the son was a minor. According to approved opinion, specific performance may be granted against a minor in a proper case. But it must be shown that the transaction is for the minor's benefit or necessary to protect his interests. As pointed out by *Jenkins*, C. J., at page 336, the same rule would, in reality, be applicable so far as specific performance is concerned, even if the son were an adult.

Ganoo v. Shri Dev Sidheshwar—I. L. R., 26 B. 380:—It is somewhat confusing to be told, as we are told in some decisions, that, in an ejectment suit, the objection that the tenancy had not been determined by a proper notice to quit could, for the first time, be taken in Second Appeal. *Fulton, J.* says with the concurrence of *Chandavarkar, J.* that, in an ejectment suit, the objection to ejectment of want of notice is fatal even if taken for the first time in Second Appeal. Surely there is no special rule of pleading with reference to this question. When a tenancy can be terminated only by proper notice to quit the plaint must, of course, allege that such notice has been given, for, otherwise, on the face of the plaint, it would not appear that the tenancy has been terminated and that the plaintiff is entitled to maintain ejectment. But this is only the application of a rule which is equally applicable to all kinds of suits, for every plaint must contain allegations which, on the face of them, show that the plaintiff is entitled to maintain the action. If they do not, the suit ought to be dismissed and the objection that, on the face of the plaint, the action is not maintainable, could be taken

for the first time in second appeal, being purely a legal objection. But suppose the plaint did allege that proper notice to quit was given and the allegation was not traversed by the defendant in his written statement or afterwards, until the matter went up on second appeal. Could he then raise the objection for the first time? To our mind, it is clear he could not, unless the notice alleged in the plaint is on the face of it an improper one according to law. If the fact of notice is not disputed in the written statement, it cannot be disputed afterwards, unless, with the leave of the court, the written statement be amended. In the case under notice, the defendants denied notice but no issue was raised on the point. The plaintiff obtained the decree in ejectment. The learned Judges reversed the decree and dismissed the suit holding that the plaintiff should have proved the termination of the tenancy by notice to quit and that the duty of raising the issue rests on the court and not on the defendant. But can it be held that the plaintiff was to blame for not proving the notice when the court omitted, wrongly no doubt, to raise the issue? Surely, the plaintiff was entitled to proceed on the footing that the questions arising in the case had been raised by the court. If the court made a mistake in not raising an issue, it seems clear that the learned Judges should have directed the framing of an issue and given an opportunity to the plaintiff to prove that proper notice had been given. We cannot but suspect that they were misled by an impression that there was some special rule about a defendant being entitled to get a suit in ejectment dismissed, by contending for the first time in second appeal that no notice to quit had been given. The learned Judges referred to *Dodhu v. Madhav Rao*¹ as an authority for this position. But in that case the plaint did not allege that notice to quit had been given. And, therefore, the plaint did not disclose a cause of action for ejectment. Without committing ourselves to the statement that all the cases on the subject are uniform, we may confidently state that an examination of the cases will show that, where the objection of want of notice to quit was allowed to be raised for the first time in second appeal, either the plaint did not allege the giving of such notice or the notice alleged was legally insufficient to terminate the tenancy. And, therefore, the question raised in second appeal was purely one of law. But

1. I. L. R., 18 B. 110.

the rule that questions of fact or of mixed law and fact cannot be raised for the first time in appeal is as much applicable to suits in ejectment as to other suits.

Bai Hariganga v. Tricamlal Kedareshwar—I. L. R., 26 B 374:—If the Bombay High Court is right in its decision in this case, people who rebuild their houses need to take a good care where they open their windows in the new house, for an easement of light acquired by prescription is lost, if the cones of light required for the new windows are not the same as the windows of the old house were receiving.

Chamar Haru Dalmel v. Kashi—I. L. R., 26 B. 388:—Remarried Hindu widows are certainly receiving better treatment than the legislature intended to accord to them when it passed the Re-marriage Act. The construction put on S. 2 of the Act viz., that it deprives remarried widows only of rights and interests which they actually possessed at the time of the remarriage and not of those that they subsequently would acquire under the Hindu Law, is adhered to in the case under notice, the Court holding that a widow is entitled to succeed to the property of her son by her first marriage, dying childless, after her second marriage.

SUMMARY OF RECENT CASES.

In re Jukes—Ex Parte Official Receiver [1902], 2 K. B. 58.

Bankruptcy Act, 1883 (46 and 47 Vict. C. 52) S. 49—Transfer of debtor's property for past debt—Fraudulent preference—Act of Bankruptcy.

S. 49 of the Bankruptcy Act does not protect a creditor who takes over substantially the whole of a debtor's property in satisfaction of a past debt, knowing that there are other creditors. Such a transaction is an act of bankruptcy on the part of the debtor and is *prima facie* a fraudulent preference, and the creditor cannot be said to act in good faith.

Hornsey Urban Council v. Hennell [1902], 2 K. B. 73.

Public Health Act, 1875 (38 and 39 Vict. C. 55), Ss. 150 and 327.—Crown Prerogative—Exemption—Property held by Volunteer corps for military purposes—Liability for expenses of paving.

The general principle is that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound. The intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments.

There is no general practice leading to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon, or that the insertion of a particular protecting clause is intended to show that only that class of Crown property was intended to be exempt.

Semble :—There may be provisions in public Acts of Parliament so framed as to bind the Crown even though the Crown may not be specially named.

Lands held for military purposes by a person who has no use or occupation of the premises other than as a colonel commanding the corps are lands owned and occupied for Crown purposes and as such are not liable for any expenses incurred by a local authority under S. 150 of the Public Health Act, 1875, which does not take away the Crown prerogative notwithstanding the limited exemption of certain Government lands in S. 327 of the same Act which is only inserted *ex majori cautela*.

[S. 150 of the Public Health Act (material portion) runs thus :—
Where any street within any Urban district (not being a highway repairable by the inhabitants) * * is not secured, levelled, paved * * to the satisfaction of the Urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting on such parts thereof as may require to be sewered, levelled, paved * *, require them to sewer, level, pave * * the same within a time to be specified in such notice * * . If such

notice is not complied with, the Urban authority may, if they think fit, execute the works * * ; and may recover, in a summary manner, the expenses incurred by them in so doing from the owners in default

S. 327 (material portion) runs thus:—sub-sec. 2. Nothing in this act shall be considered to authorize any local authority to disturb or interfere with any lands or other property vested in the Lord High Admiral of the united Kingdom or in her Majesty's principal Secretary of State for the war department for the time being.

Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales [1902], 2 K. B. 88.

Procuring or inducing breach of contract—Bona fide belief—Justification.

A person has a cause of action against persons interfering with his contractual rights unless the latter have a sufficient justification for their interference.

It is not a sufficient justification to say that the person interfering acted on a wrong understanding of his own rights, or *bona fide*, or without malice or in the best interests of himself or others. But such a justification must be an equal or superior right in the person interfering.

Quinn v. Leatham (1901), A. C. 495, followed.

Edelstein v. Schuler & Co. [1902], 2 K. B. 144.

Negotiability—Usage—Debenture payable to bearer—Law merchant—Conversion—Holder for value.

Negotiability can only be attached to a contract by the law merchant or by a statute.

The law merchant is not fixed and stereotyped. It has the facility for adapting itself to the changing needs of the public and to meet the wants and requirements of the trade.

In determining whether usage has become established so as to be binding on Courts of law, the length of time during which the usage has existed is an important circumstance. But in these days of advancing civilization and commerce the guiding circumstance is the number of transactions and not necessarily the time over which such transactions are spread.

It is now too late in the day to question the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English. The very expression 'bearer bond' connotes the idea of negotiability and the moment such bonds are issued to the public they rank as negotiable securities.

Bechuanaland Exploration Co. v. London Trading Bank,
[1898], 2 Q. B. 658, followed.

Courts of law ought to take judicial notice of their negotiability.

A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. But if, in addition to negotiating a sale, the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorized sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves, which is inconsistent with the rights of the true owner.

A holder for value of a negotiable instrument will not be liable in trover to the true owner from whom such negotiable instrument was stolen by a third person. A broker who has entered into a contract to sell such negotiable instrument on behalf of a person in possession of the same and in the ordinary course of his business gets such instrument for delivery to the purchaser is a holder for value.

Hughes v. Pump House Hotel Company [1902], 2 K. B. 190.

*Judicature Act, 1873 (36 and 37 Vict. C. 66) S. 25 sub-sec. 6—
Absolute assignment—Mortgage—Charge.*

An assignment is absolute either where there is a sale or there is a mortgage.

An absolute assignment enables the assignee to maintain a suit in his own name. A suit cannot be maintained in the name of the assignor in such a case.

An assignment purporting to be by way of charge only is not absolute, and a suit can only be maintained in the name of the assignor.

Whether an assignment of part of a debt can be absolute within the meaning of Judicature Act S. 25, sub-sec. 6 :—*Quare.*

Hulthen v. Stewart and Co., [1902], 2 K. B. 199.

Charter-party—Discharge of cargo, as fast as the steamer can deliver—Crowded state of the dock—Delay—Discharge within fixed period—Absolute obligation.

The expression in a charter-party that "the cargo shall be discharged with customary steamship despatch as fast as the steamer can deliver" does not import the same obligation as to discharge of cargo as if certain days were named though it may be proved that the cargo can be usually delivered within a certain number of days and "the customary despatch" may have reference to such usual occurrence. A condition in a charter-party that the cargo shall be delivered in a certain number of days imports an absolute obligation and must be fulfilled notwithstanding there may be no delay on the part of the master of the ship or shipowner and notwithstanding that the delay may have been due to the crowded state of the dock.

In re A Debtor—Ex parte Smith, [1902], 2 K. B. 260.

Fi. fa.—Simultaneous plurality of writs—Seizure under fi. fa.—Subsequent fi. fa.—Goods of third person—Seizure.

When under a writ of *fi. fa.* the Sheriff has seized the goods of the judgment-debtor, the judgment-creditor cannot have another writ of *fi. fa.* upon the same judgment until a return has been made to the first notwithstanding the judgment-creditor may have abandoned the seizure.

A judgment-creditor may, however, be entitled to the issue of two writs of *fi. fa.* simultaneously or at the same time.

If the sheriff seizes goods not belonging to the judgment-debtor the judgment-creditor may be entitled to the issue of a second writ of *fi. fa.* before any return has been made to the first.

Walter v. Yalden [1902], 2 K. B. 304.

Lease for term—Adverse possession against lessee—Surrender by lessee to lessor—Lessor's right to recover against trespasser.

The law is that a lessee can by a surrender give title to his lessor only to that extent to which he could give it to another by his assignment.

Where, therefore, a trespasser acquires a good title as against the lessee, the latter could not by surrendering his term to the landlord defeat the trespasser's rights. The right of entry, therefore, accrues to the landlord not from the date of the surrender but only on the determination of the lease.

A term of years may be a particular estate, but the reversion dependent on a term of years cannot be a future estate expectant on a particular estate. Such reversion is an existing estate. Where, therefore, a landlord granted a lease for a term of 99 years, provided that three named persons should live so long and a third person dispossessed the lessee and remained in possession for

such a length of time as to preclude the lessee from maintaining a suit for ejecting him, and the lessee afterwards surrenders to the landlord 9 years after the last of the three lives dropped and the action was commenced by the landlord to recover possession from the third person, 12 years after the surrender and more than 6 years after the determination of the lease but within 12 years of such date :—

Held : (1) that the right of entry accrued to the landlord only on the dropping of the last of the three lives when the lease was determined, and

(2) that the landlord had 12 years and not 6 years from the date of the determination of the lease to bring his suit for recovery of the lands demised.

In re Borovsky & Weinbaum—Ex parte Salaman

[1902], 2 K. B. 312.

Fugitive offender—Extradition Warrant—Properties found on offender—Delivering up to foreign state—Conditions.

Where a fugitive offender is arrested in England on an extradition warrant for offences committed in a foreign state and immediately after is adjudicated a bankrupt in England the property found on such person at the date of his arrest vests in the trustee in bankruptcy.

This, however, does not oust the jurisdiction of the committing magistrate to order the properties so found to be delivered up on committal to the foreign authorities to be used as evidence of the crime at the trial. The magistrate should have the concurrence of the Secretary of State in such a case and in making the extradition order an undertaking should be taken that when the criminal proceedings are concluded in the foreign state the latter should restore the property to the jurisdiction of the English Bankruptcy Court. After such handing over the latter court will give any claimant full opportunity of establishing his title before any final distribution is made.

**East Stonehouse Urban Council v. Willoughby
Brothers, Limited [1902], 2 K. B. 318.**

Leased property—Property not included in lease—Possession by lessee as under lease—Limitation against landlord.

Where properties not included in the trust are come into the possession of the trustee by reason of the latter's possession of trust property they also devolve according to the trusts as being accretions to the trust property. So where a tenant is in possession of other property not included in the lease and holds possession of such other property only by reason of his possession of the property leased such other property not included in the lease is an accretion to the demised property, and no limitation runs against the landlord from the date of the lease or from the date of the possession. Even where a tenant encroaches, the presumption is that the encroachment is an accretion to the holding, and limitation for recovering such encroachment runs against the landlord only on the determination of the lease.

Rex v. Plummer [1902], 2, K. B. 389.

Conspiracy—Joint charge—One prisoner pleading guilty—Acquittal of others, effect of, on plea of guilty—Withdrawal of plea before sentence—Effect of sentence after judgment of acquittal of others.

Where a prisoner has pleaded guilty to a charge, the court has power, at any time before judgment or sentence, to allow the prisoner to withdraw his plea and plead not guilty.

Upon an indictment charging three persons jointly with conspiracy and one pleads guilty and the other two are tried and acquitted, such judgment of acquittal operates also as an acquittal of the one pleading guilty.

Even where upon the person pleading guilty judgment is passed and then the others are acquitted the judgment passed against the one who pleaded guilty though right when passed is bad and must be vacated by reason of the judgment of acquittal. For one alone cannot conspire.

Similarly a judgment passed against an accessory passed during the attainder of the principal was good during the attainder but was *ipso facto* avoided when the attainder was removed.

Budd-Scott v. Daniell, [1902], 2 K. B. 351.

Lease for term—Implied covenant for quiet enjoyment—Duty to paint by statute—Vis major.

Where there is a letting for a term, a covenant for quiet enjoyment is to be implied from the mere relationship of the parties (viz., that of landlord and tenant).

It is not necessary that any special words such as 'demise' or 'grant' should be used for this purpose.

Dictum of Kay, L. J., in Baynes & Co. v. Lloyd and Sons, (1895), 2 Q. B. 610, dissented from.

Where the landlord was under a statutory obligation to paint the outside of the house and it was found by the first Court that the doing of that painting rendered it necessary for the tenant to leave the house and that this was a breach of the implied covenant for quiet enjoyment:—

Held on appeal that the landlord not having protected himself by the terms of the tenancy and there being no *vis major* the appellate court could not interfere with such finding.

Bailey v. Thurston & Co. [1902], 2 K. B. 397.

Bankruptcy—Rights of trustee to sue and interfere—Bankrupt's right to sue.

Generally all property vested in a bankrupt at the date of his bankruptcy passes to his trustee, and the bankrupt cannot sue for or in respect of it.

The bankrupt can sue for or in respect of property which he acquires after bankruptcy; but his trustee can at any time intervene.

If the trustee does not intervene or interfere in the course of the action, he may yet take the benefit of the decree obtained by such bankrupt.

An action by a bankrupt for wrongful dismissal under a contract under which something to be done on the part of the bankrupt after bankruptcy is an action to recover personal earnings which he was entitled to make for himself and can be maintained by such bankrupt subject to the trustee's right of intervention during action and provided the trustee has not already sued or claimed for him. But where there is nothing to be done by the bankrupt under a contract prior to bankruptcy and the bankrupt is entitled to certain benefits whether claimable immediately or after the date of bankruptcy, the trustee is the only person entitled to enforce such rights.

Rimmer v. Webster [1902], 2 Ch. 163.

Conflicting Equities—Innocent persons—Loss suffered by act of one person—Principal and agent—Estoppel—Limitation of authority—Transfer of bond—Purchase-money stated to be paid—Transferee fraudulently assigning—Assignee's title good.

It is impossible to say that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must sustain the loss.

A man may in many cases intrust another with all the *indicia* of ownership, including the legal title, and yet not deprive himself of his equitable rights.

A man may transfer his shares in a company to a single trustee, and intrust him with the certificate and yet enforce his equitable title against a purchaser or mortgagee of the trustee who has not obtained the legal title. So he may cause land purchased by him to be conveyed to a trustee by a deed containing a statement that the trustee has paid the purchase-money and may hand over the deed to him and yet enforce his equitable title in a similar way.

It is not the law that if a person entitled absolutely to the equitable interest in a share in a railway company or land or any kind of property chooses for his own purpose to have that share or land or any kind of property standing in the name of a trustee for

him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into.

The cases in which one of two innocent persons who have enabled a third person to occasion a loss will be made to suffer the loss are two—

- (1). cases of principal and agent.
- (2). cases of estoppel.

In the first case the man possessed of the prior equity will be deprived of his title if he has been guilty of negligence which imports the neglect of some duty towards the person injured. Where, therefore, a person hands over the *indicia* of title to a third person with authority to deal with the same and that authority is limited, the principal is under a duty to persons whom he intends to act on such authority to give them notice of the limitation of authority.

In the second case if the owner of property clothes a third person with the apparent ownership and right of disposition thereof not merely by transferring to him but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value.

Where a man acknowledges that he has received the whole of the purchase-money from the person to whom he transfers property he “voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of incumbrance or adverse equity”, and he cannot be heard to say that he has not in fact received the purchase-money.

- • Where, therefore, a person transferred the whole legal title in a bond issued under statutory powers to another for the purpose of enabling him to deal with the same and executed a transfer which stated that the transferee had paid him the consideration, and the transferee mortgaged it to a third person who paid value and acted in good faith, but the transferee misappropriated the amount:—

- *Held* that the mortgage was valid, that the owner of the legal title was estopped from disputing its validity and that his claim to a lien for unpaid purchase money was also defeated.

Devonport Corporation v. Tozer [1902], 2 Ch. 182.

By-laws, breach of—Special remedy—Remedy by injunction—Declaration.

There are three classes of cases in which a liability founded upon a statute may be established.

The first is, where there was a liability existing at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law. The party suing has, in such a case, his election to pursue either the common law or the statutory remedy unless the statute expressly or by necessary implication excludes the common law remedy.

The second class of cases is where the statute gives the right to sue merely but provides no particular form of remedy, then the party can only proceed at common law.

The third class of cases is where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, then the remedy provided by the statute must be followed and it is not competent to the party to pursue any other remedy.

A breach of the by-laws constituted no offence or gave no right of action at common law.

Where, therefore, under the by-laws framed under the Public Health Act it was provided that certain requirements should be complied with in laying a new street, and a penalty was prescribed for infringement:—

Held, that the by-laws could not be enforced by action for injunction, but only by the special remedies thereby provided and that no declaration could be made that the Urban authority are to remove work begun in contravention of the by-laws.

In re Greenwood—Goodhart v. Woodhead [1902], 2 Ch. 198.

Conditions precedent and subsequent—Devisee to assume testator's name—Period for performance—Act of God.

Whether a condition annexed to a devise is precedent, or subsequent depends upon the intention and if it is possible, the Court will prefer the construction that a condition is subsequent and not precedent.

A condition that a devisee should assume the name of the testator is an affirmative or positive condition which requires an act to be done by the devisee which might have been performed *instantly* or at any time without the consent or occurrence of any other person being necessary. Any person may at any time take and use any name he pleases.

Even where a condition is subsequent if the condition be one to be performed by the devisee personally, not at a particular time, but in effect at any time he pleases, and not requiring the intervention or concurrence of any other person, no period being expressly allowed or limited for its performance which may possibly outlast the life of the devisee, the period for the performance of the condition is naturally and necessarily the life of the devisee and no longer; and the condition is not complied with, but is in fact broken, if the devisee dies or becomes insane without having performed it.

Death or supervening lunacy of the devisee without performing the condition to be performed by the devisee personally is not an act of God so as to excuse the devisee from performing the condition.

Where a testator devises his real estate to his daughter for life and after her death to her children and if she should have no child to a third person on condition that he should take and use the testator's name without fixing any time and there is no gift over or express defeasance, it is probably a condition precedent.

In re Puckett and Smith's Contract [1902], 2 Ch. 258.

Vendor and purchaser—Building purposes—Underground culvert—Misdescription—No good title shewn.

Where a misdescription, although not proceeding from fraud, is so material that it may reasonably be supposed that, but for such misdescription, the purchaser would never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation.

Flight v. Booth, 1 Bing. N. C. 370, S. C. 41, R. R. 599, followed.

Where, therefore, property is sold to the purchaser for the purpose of his building upon it and the vendor also represented to the purchaser that it was suitable for building, and there was an underground culvert for water running across the land which was a substantial drawback to the use of land for building purposes and which was not visible when the purchaser inspected and one of the conditions of sale was that any error in the particulars should not annul the sale, but a condition in the sale that the property is subject to rights of way, water &c., was struck out:

Held that a good title to the property was not shown by the vendor in accordance with the contract.

Van Praagh v. Everidge [1902], 2 Ch. 266.

Specific performance—Auction sale—Mistake on one side—Purchase of wrong lot—No extravagant price—No defence.

Where a purchaser at an auction made an extraordinary blunder that he was purchasing one thing when in fact he was purchasing another thing, there is a contract capable of enforcement and the auctioneer is authorized to sign the necessary memorandum on behalf of the purchaser. The authority to the auctioneer to sign comes into operation only on the acceptance of the bid, and it cannot be revoked afterwards.

A purchaser may escape from his bargain on the ground of mistake, if it was a mistake to which the vendors contributed *i. e.*, if he was misled by the vendors.

If the mistake was entirely the purchaser's own, then the court ought not to let him off his bargain on the ground of mistake made by himself solely, unless the case is one of considerable harshness and hardship.

Where, therefore, at a sale by auction of landed property, the defendant purchased one lot mistaking it for another, and such mistake was solely due to his own carelessness and though the price was high it was not extravagant and the defendant's business was to buy and develop estates, and the estate now bought might be used for such a purpose, and no great hardship, therefore, would accrue to the purchaser in holding him to his bargain :—

Held that specific performance could not be resisted by the purchaser.

Walter v. Ashton [1902], 2 Ch. 282.

Injunction—Unauthorized use of name—Holding out as partner—Reasonable probability of risk and liability—Ad interim injunction.

The court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then an injunction is the proper remedy. In considering what kind of liability will justify interference, the court will be careful to see that the suggested liability was not something merely imaginary, or shadowy.

If a man allows his name to be held out to the public as being the person responsible for a transaction, he may be held liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorized the act because he has not taken steps which he should take to stop the unauthorized use of his name.

Where, therefore, the defendant, a dealer in cycles advertised his goods in a manner which satisfied the court that he intended the public to believe that the proprietors of the *Times* newspaper

were either the vendors, for whom he acted as managers or were partners connected with the sale of his 'Times' cycles, and there was a reasonable probability of the *Times* being exposed to litigation and the proprietors of the *Times* newspaper brought a suit for injunction against the defendant and pending such suit applied for an *ad interim* injunction.

Held that the plaintiffs, the proprietors of the *Times*, were entitled to an *ad interim* injunction.

In re Davis—Davis v. Davis [1902], 2 Ch. 314.

Trustee—Trading in trust funds—Breach of trust—Rights of cestui que trust—Profit—Interest.

If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust.

If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear or cannot be made to appear what profits are attributable to such employment, he must account for trade interest i. e., interest at 5 per cent.

Aerators, Limited v. Tollitt [1902], 2 Ch. 319.

Companies Act, 1862 (25 and 26 Vict. C. 89) S. 20—Company—Registered name—New Company—Similarity of name—Single word—Injunction—Quia timet action—Mistake—Probability of deception—Public rights—Attorney-General—Special damage.

Under section 20 of the Companies Act, 1862, a company has a greater right than an individual in respect of names that are identical.

But a company has no greater right than an individual in respect of names which are not identical but only similar. In such cases it is a question of fact whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical, and this is determined by ascertaining two facts :—

- (1). What business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new one.
- (2). What sort of name has been adopted by the old company.

In order to determine the first it is not enough, especially in these days, when the objects of a company are usually limited by the number of letters in the alphabet and extend to every form of business whether connected or not with the principal object, to show that the intended new company includes some similar objects, but it is necessary to see whether the real objects of the second company are similar.

As to the second, it is necessary to consider the nature of the title registered by the old company.

But a company merely by registering as its title or part of its title a single word which is descriptive and in common use in English language cannot remove that word from the English language so as to prevent its use in the title of subsequent companies.

Where, therefore, a company registered as '*Aerators, Limited*' and having for its object the working of a certain patent for the instantaneous automatic aeration of liquids sought to restrain the registration of a new company to be called '*Automatic Aerators Patents, Limited*,' having also a similar object of working certain patents for the instantaneous automatic aeration of liquids, but the patents of the proposed new company were different.

Held that the plaintiffs were not entitled to an injunction and they had no monopoly of the word 'aerator'.

The action under section 20 of the Companies Act, 1862, is a *quia timet* action, and evidence of actual mistake in such cases is impossible; there can only be a probability of deception.

The words "calculated to deceive" in the same section do not point to intentional fraud.

Semble :—Section 20 was intended for the protection of the public. Persons cannot assert in their own names the right of the public. It can only be done by the Attorney-General. Persons members of the public can assert their own rights if they shew special damage.

H. E. Randall, Limited v. The British and American Shoe Company [1902], 2 Ch. 354.

Companies Act, 1862, Ss. 41 and 42—Limited Company—Purchase of good-will—Right to trade name—Interference with right—Carrying on business without registered name—Injunction.

A limited company buying an old business (good-will) is entitled to protection, if their exclusive right to use such name is interfered with, though the limited company may use the name of the old business without their own registered name and may thus have contravened sections 41 and 42 of the Companies Act of 1862.

So also a limited company may acquire a right to a trade name which they may have themselves established by their own exertions and will equally be entitled to protection notwithstanding that the user of such trade name was in contravention of sections 41 and 42.

The Companies Act, 1862, sections 41 and 42 impose certain penalties on a company for non-compliance with its provisions; but the additional penalty of forfeiting its good-will to any dishonest person who chooses to steal it is not imposed by the statute.

Wright v. Horton, (1887), 12 App. Cas. 371 and *Pearks, Gunston and Tee, Limited v. Thompson, Talmey and Co.* (1901), 18 Rep. Pat. Cas. 185, followed.

JOTTINGS AND CUTTINGS.

The Etiquette of the Bar : Sir Arthur Collins at the Bar.—

The sticklers for propriety and precedent at the bar—and unfortunately they are very numerous, for they include most of those who have nothing to do and who might therefore be supposed to be indifferent to what does not concern them—have lately (says the *Manchester Guardian*) had an interesting problem presented to them by the appearance in the courts of a tall, dignified man with a clean-shaven, powerful face and an aspect of authority, who wears the robe of a King's Counsel and sits in the front row. To a large number of those who sit in court he is unknown, and yet he is not one of those who pass unnoticed anywhere. It is Sir Arthur Collins, late Chief Justice of Madras, who was once a well-known personage in Westminster Hall and on the Western Circuit, who, having served his full term in Madras and come home with a pension, finds time hang heavy on his hands, and has therefore once more put on his barrister's robes and begun to practise. Can a retired judge do this? is the question severe critics of the junior bar are putting to each other. Ought he to do it? is another. I suspect the answers to both questions given by those who put them is in the negative, but I believe the Lord Chancellor and the Attorney-General, whom circumstances have naturally endowed with a more delicate sympathy, say 'yes', and accordingly there is Sir Arthur Collins adding a fine figure to the King's Counsel Bench. The fact is, the question was settled in favour of the Indian Judges thirty years ago or more, when Sir Mordaunt Wells, who was a luminary at the Parliamentary bar, was made a Judge in India, and on his return home on pension quietly resumed his work in the Committee rooms and maintained his position, in spite of the clamour of many other barristers practising before the same tribunal. The old rules, or supposed rules, disqualifying certain persons from practising before certain tribunals are disappearing. Thus it was the notion that no member of the Privy Council could take any part in the profitable and agreeable work before the Judicial Committee of the Privy Council, for the theory was that this committee was in fact the Council itself, and no one could appear as counsel before a judicial body of which he was member. This rule is certainly in full force

to prevent a magistrate of a county from practising before petty or quarter sessions in that county. And, as regards the Judicial Committee, it is undoubted that when Lord James of Hereford (then Sir Henry James) was made a member of the Privy Council, he refused to accept briefs before the Judicial Committee.—(*The English Law Journal*).

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Hearsay evidence in German Law:—In Germany hearsay evidence is received as well as other evidence. A witness may state his conclusions and may give his reasons for such conclusions. Documents of all kinds are admitted without proof. In certain cases where a witness may not be sworn, his unsworn testimony may be taken and considered. The Code of Civil Procedure provides that when a witness is to be examined he is to be informed of the subject-matter of his proposed examination, and he is then to be induced to state connectedly what is known to him of such subject-matter.

A useful provision seems to me to be that which requires the court, before administering an oath to the witness, to point out to him in a proper manner the importance of such oath. Each witness must be examined separately and in the absence of other witnesses thereafter to be examined.

The theory of evidence in Germany, is that the court is to ascertain the truth without regard to technical rules, and decide according to its conviction. A judge cannot decide, as he may with us, that a matter alleged is a fact or is not a fact, when he is convinced that it is otherwise. The doctrine of the "free appreciation of evidence" (*Freie Beweisurtheilung*) prevails. A German law-writer says that this free position may unhesitatingly be granted to the German Judge in view of his training, integrity and independence.

In Germany parties may not call expert witnesses. The court determines whether the testimony or the opinion of experts is required and then appoints such experts. The court also determines the number of experts.—(36 *American Law Review* 570.)

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Criminal evidence:—Confession obtained by the use of the "Sweat Box" not admissible in evidence against the accused:—

The decision of the Supreme Court of Mississippi, in *Ammons v. State*, lets us into the secret of what is known as a "Sweat box." It seems that it is an apartment about 6 × 8 feet in dimensions, which is kept entirely dark and blanketed, the prisoner incarcerated therein being allowed no communication whatever with human beings except his Jailer or the detective who put him there who occasionally appears and interrogates him about the crime charged against him, using various methods to cajole or frighten a confession out of him. In the case under consideration, the officer told the prisoner that "it would be better for him to tell the truth," and after several days of obstinate denial, the confession sought to be put in evidence was elicited. The Supreme Court of Mississippi, speaking through Mr. Justice Calhoun, made the following observations upon this infamous proceeding, citing the authorities in the margin:—

This sweat-box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they tell the truth, that is, confess guilt of the crime—they are let out of the sweat box. Speaking of this apartment and the habit as to prisoners generally, this officer says; "We put them in there [the sweat box], when they don't tell me what I think they ought to". This is refreshing. The confession was not competent to be received as evidence. Defendant, unless demented, understood that the statement wanted was a confession, and that this only meant release from this "black hole of Calcutta". Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity personal right.

They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial. (36, *American Law Review* 624).

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Telegraph Companies:—Liability for furnishing news for unlawful purposes. In the case of *Commonwealth v. Western Union Telegraph Company* recently decided by the Court of Appeals of Kentucky, the defendant had been indicted for receiving and transmitting race track news to certain persons who were engaged in maintaining a gambling house. The statute law of Kentucky made the maintaining of gambling houses, the betting on horse-races etc, a common nuisance; and the question presented for decision, therefore, was whether the Telegraph Company was liable for transmitting news which facilitated conduct directly prohibited by the statute. The Court held that it was not. It was not averred in the indictment that the Company had any control or management of the gambling house; but the only question was whether it was guilty of keeping the house from the mere fact of its transmitting news and information which facilitated the operations of the house. The law creating the Telegraph Company provided that it should be a common carrier of intelligence and information and placed a penalty upon it for withholding the transmission or delivery of messages, prepaid and couched in decent language. The court said that common carriers were not the censors of public or private morals, and that it was not wrongful *per se* for the company to transmit the information over its line. The fact that the person who received it might, by the aid of it, perpetrate unlawful acts, did not make the company a violator of the penal or the criminal law. (36 *American Law Review* 628).

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Starting in Law. By Hon. Otto Kirchner.

(Address before the Law Class of 1902, University of Michigan).

I trust you all understand that I am not here to give you a lecture, but to make an address. The Committee that waited on me some months ago asked me whether some time during the college year I could come and give you some hints in regard to the practice of the law, and that is what I am here for to-night.

Assuming that you have your diploma and are admitted to the bar, the very practical question presents itself for your consideration. What are you going to do? Are you going to launch out

for yourself, open an office and practise law at once? Some of you undoubtedly have been admitted to the bar and have had some experience, but for those of you who have not I should say it would be very poor policy to enter at once upon professional work. You get in a three years course a very thorough grounding in the theory and principles of the law and you get a little taste of the practice, but I should say and I trust you will not take offence at the suggestion that very few of you are fitted to enter at once upon active practice, you must enter some office and get practical experience.

Now, what kind of an office? you have an idea that you wish to go to New York; you have heard of Mr. Joseph Choate, of James' C. Carter and others, and you think it would be a great thing for you if you could enter the office of one of these gentlemen. But, on general principles, I should say it would be a very serious mistake for you to go into the office of one of these lawyers, because these gentlemen, being distinguished lawyers, have comparatively few cases, and very few of a character in which you would be called upon to assist. The result would be that you would learn nothing of the actual practice of the law in such an office.

The kind of office that you should seek is the office of an every-day commercial lawyer—not a man who figures in great cases, not a man that you read about, but the man who is thoroughly at work, who has all kinds of cases; who has fifty or a hundred cases where Mr. Choate has one. The business in a City office is very much specialized, and it is getting to be more and more so. Here is a firm that is devoted to collection business, with all its ramifications; here is a firm that is devoted to criminal business; here is a firm that is devoted to trademark and patent cases or to corporation law. But in the smaller towns you will find offices where every kind of business is being done. And therefore I say to young men: if you wish practical experience in the practice of the law and wish to come into contact with the hard work of the law, go into the office of a good, reputable, country practitioner. You will learn more there in a year than you will in a city office in five years.

* * * * *

If you have had occasion to observe and to reflect you must by this time have come to the conclusion that the men who are

successful at the bar, who have the respect and confidence of the Judges, of the courts, of the business community and of their professional brethren are not the brilliant lights in the profession, but the honest, hard-working men of sound and unimpeachable character. That is what profits. I can take a retrospect of the Detroit bar, where I have been now for thirty-six years, and I can think of the brilliant men—men who could entertain you by the hour and never weary you, who could make extraordinary and powerful addresses to juries; who would be most clever in the cross-examination of witnesses who, nevertheless, have been lamentable failures, and who went to their graves poor and forgotten and some of them dishonoured. They were talented men, but they lacked stability; they were devoid of character; they did not have the confidence of the business community or of their professional brethren, and the result was failure.

Having entered an office, do not make the mistake of staying there too long. You want to be weaned just as soon as possible. Two years is long enough. If after that time you are not competent to launch out for yourself you never will be. I have in my mind's eye young men of character and ability who graduated here, and went into offices in Detroit. One of them has been there for ten years and is drawing the same salary he received when he started. You say it is hard; but everything that is worth having is hard to attain, and if you have character and capacity, why not get it? You are not going to gather to yourself a large and unusual clientage by waiting in the office of another practitioner. Therefore, start, out! If you cannot start in the city, go to some smaller place.

* * * * *

If you are fortunate, my young friend, after you have established yourself in this way, you will not be overrun by clients. Now I mean precisely what I say. I think it is the greatest misfortune that can befall a young man to be overrun by clients at the outset. You are not mentally and professionally equipped to do the work. Moreover, it is necessary for you to cultivate the habit of patient and close investigation of everything that is submitted to you, and if your business is large you cannot give this attention to the cases committed to you.

But you can be kept busy at the outset of your career; you should always be busy. If there are no cases on hand demanding your investigation, pursue a course of study. Begin studying the leading cases of your own state. Study the Statutes of the State. Become thoroughly familiar with the jurisdiction and powers of the different courts and their practice; the constitutional and legislative history of the state, and then take up one topic after another. You will have plenty of time to do it. You will have time then—ten years from that time you may not have the opportunity. Ten years from then you may not have occasion to use all that learning. You certainly will not, my young friends, unless you cultivate this habit of study.

* * *

Now the question arises, what kind of business shall you take? Are you going to be a specialist? Let me advise you in the strictest confidence: Take whatever decent business comes. Do not be too particular about cultivating a specialty. The specialty will take care of itself; it will evolve, like anything else, if you are fitted for it. Take nearly every case that comes. If a man has a cause that is to be submitted to a court of justice, he has a right to have his cause presented by the ablest man that he can find, and it is most cowardly and pusillanimous for any man claiming to be a lawyer to say: "I cannot take your cause because it is unpopular; because people think you are dishonest; because people think you deserve to be punished; because people think you err and are wrong." That is not for you to decide; it is for the court to decide.

And what do you do when you take a man's case? Do you try to present his case? Do you try to present to the Court his case other than it is? Far from it. Present his case and present for the consideration of the court and the jury everything that may in fairness and honesty and good sense be said in his behalf. If you do not do that you fail to discharge your duty. If you do more than that you are dishonest and untrue to yourself, you are untrue to your profession and you are not honest with the court.

I do not know whether I make myself clearly understood. Now, here is a man who has a case. There is a man on the other side of that case. Each of them thinks he is right. The Court

will have to decide. If you are for the plaintiff you should present to the court all that may honestly and fairly and in common sense be said in support of that case, and there you should stop. To do all that requires a good deal, of which I shall speak presently.

You have no right to advance an argument in support of the plaintiff's case that you know is not sound. On looking the case over you may think that the plaintiff has no case. Nevertheless, he may have; it is not for you to say. On looking the case over you may say that "A, B and C are each a consideration that may fairly be urged on behalf of the plaintiff." Now you urge those considerations. But here is another consideration D, that you are asked to urge in favor of the plaintiff. You look that over and you say, "Now D is not a good argument in support of the plaintiff's case. I do not believe it is sound. I do not believe that D tends to show that there is merit in the plaintiff's case. I do not believe in D at all." Nevertheless, you urge D. If you do that you are doing something that is thoroughly dishonest and you ought to be ashamed and repent in sackcloth and ashes, you are prostituting your intellect, you are debasing your manhood and disgracing your profession.

Now I cannot lay down for you a hard and fast rule by which you are to determine whether you are to take a case or not. That is impossible. But there is a certain clientage that keeps floating about and comes to new comers. They are connected with the nether current in the city or town in which you live. They are marked men. They are known to the police; they are suspected and looked at askance. Give them a wide berth. Do not say to yourself, "Their money is just as good as somebody else's." All these men need a good defence. They are entitled to have the best said in their defence and to have a good show. But don't you trouble yourself. There are erring brethren enough who will take their money and perish with it.

* * * * *

Do not make merchandise of your profession. Do not consider it a trade. Do not barter with it. Remember that you are a minister of justice sworn to support the law and constitution of the land and to present the cause of justice on behalf of those who are

called to answer before the courts of justice; and as a minister of justice above all things you must keep your skirts clean; not only be clean yourself and know that you are clean but so live that others may know that you are clean. If possible be above suspicion. "Avoid the appearance of evil." I believe that is an old and very familiar quotation. It was uttered a good many years ago, but it will hold just as good to day and in no profession is it so valuable as it is in the practice of the law.

Now I have spoken of litigated cases. The trial of cases, my young friends, is not as important to-day as it used to be. The world has learned a great deal especially in the last century and clients—especially clients having large interests at stake—are beginning to realize that a law suit is a very poor asset. And so it comes in our day that controversies involving very large properties—very large amounts—are seldom litigated. You take up the court gossip column of the Detroit papers and see how little there is in it of large litigated matters.

Are there no large litigations? Yes, certainly, people will disagree. There are large transactions than ever, and out of this great volume of business differences will naturally arise and they will have to be submitted to counsel. Now when a matter of that kind is submitted to you, your first inquiry should not be. "Is this man good for anything? Where is he? How soon can we serve him?" The question for you to study is. "What is this case? What are the equities of the case? What is the law of the case? What are my clients' rights? What are the other man's rights?" And if after careful study and investigation you have come to a conclusion, you go to your brother upon the other side and you discuss it with him, and if he is a man worth being taken into a case of that kind, you will find him very reasonable. He may be a tremendous fighter in the courts, but you will find him a man of broad and equitable views and he will sit down with you and he will adjust that matter out of court and you will save your client the annoyance and expense of a law suit and you will earn his gratitude and a very large fee besides.

But suppose you cannot settle your case. The fellow on the other side is the most unreasonable chap that you ever encountered; you cannot do anything with him. Well, you have to get ready for the trial. You have got your facts together; you have examined the law most carefully, and now you have to prepare your testimony. This expression "to prepare testimony" is very often misunderstood especially by bad men—bad men out of the profession and bad men in the profession. This is a very important part of the case. In the first place there are very few men that are capable of saying precisely what they mean. There are very few men who observe accurately. One man sees ten times as much as another. Generally speaking no two witnesses of an affair give exactly the same account. The man who observes all the details of an incident is a rare bird; he is one man in a thousand.

When you have an important case you should take your witness in hand. Examine him. Write down what he says. Have your typewriter make a copy of it? Hand it to him: "Mr. Smith, look at this testimony. Read it over carefully. If there is anything wrong come back and tell me of it and correct it." Smith takes that testimony home, he reads it, he comes back the next day and he says "Yes, that is all right." You begin cross-examining him upon the theory that you are the opposing counsel, and you find that it is not so at all. You find that Mr. Smith has not told the truth. You write out another copy of his testimony; you may write out a third and a fourth statement and you may rehearse it and you may get all your witnesses together, and then when they go upon the stand you will find that they may know something that they did not say, or that they have said something that they did not know. In other words, your witness goes to pieces right before you. He may be an honest man or he may not be an honest man; he is simply a bad witness.

Sometimes you get a witness who is thoroughly frightened. Women sometimes get frightened and they tell you they do not know what they do know, and they tell you this when their want of knowledge seems to be fatal to their case. What shall you do with such a witness? You have to show by a course of cross-examination that the witness simply does not know what she is talking about. Some years ago I encountered just that difficulty. The witness said she did not know when she did know. If she did

not know she could not recover. So I began to put a series of questions to her. "What day of the week is this?" "I do not know." "What year is this?" "I don't know." "What is your name?" "I don't know." Well it was now very apparent to everybody that the woman did not know what she was talking about. This exhibition saved her case.

Having done with your witness he is to be cross-examined. Cross-examination is a most dangerous weapon in a double sense; it is dangerous to the side offering the witness, but it is more dangerous to the cross-examiner. You never ought to cross-examine a witness unless you know precisely what you want to get at and what you want to do. If you have attended a court and watched a cross-examination it may have occurred to you that it is nothing but a rehash of the original testimony; and so it is. Now what is the effect of such testimony? The effect is to strengthen the original testimony by a repetition of that testimony. And sometimes a very foolish question is asked just to serve the cross-examiner's own ends. For example a witness will say "I think" and an experienced cross-examiner will say "why do you say you think" and the witness will say "well I know". And there you have it.

Sometimes it is necessary to experiment with a witness; to try his temper and see what manner of man he is and sometimes this can be done by asking apparently foolish questions. Every witness more or less assumes an attitude of antagonism toward the cross-examiner. The moment the cross-examination begins the witness braces up: "Come on". If you want to get that witness to tell all he knows you must get him out of that frame of mind, and you can do that by treating him courteously; you can give him a compliment, especially if he happens to be an expert. Or if you want to get acquainted with him: Doctor, how long have you lived here? Where did you live before you came here? Where did you graduate? And if he has written one book or done some great work in the community, refer to it incidentally. Let him understand that you know how big a man he is. Then you have won him. But the main purpose of these questions is to test the temper of the witness; to learn what kind of man he is, whether he is apt to make his answers stronger on cross-examination than on the examination-in-chief. If he is that kind of man, you had better avoid the cross-examination.

There are some witnesses who assume the attitude of antagonism to such an extent that instead of answering your question or paying attention to your question they will be busy trying to find out what you are trying to get at, and instead of answering the question they will answer what they think you are trying to get at. Now, if you have that kind of person upon the witness stand, just give him all the rope he wants. Before he knows it he will have testified falsely; everything goes down that he says; sometimes very honest witnesses do this. But it is perfectly fair to bring out the fact, because the witness ought to be presented to the jury in the attitude in which he stands and his testimony ought to be presented for precisely what it is worth, and it is perfectly proper to bring it out in this way.

The witness should be treated courteously. There are some men who have made reputations by brow-beating witnesses. That, I may say, is a very cheap reputation. Anybody can be a bully if he is cross-grained and low-bred enough to be a bully. There is no reason why a cross-examining counsel should not be a gentleman at all times. He will make more with the court, with the jury and with the witness. Whatever you do, don't loose your temper. Just hold it. Keep cool. If you cannot keep cool anywhere keep cool in the court room. If you lose your temper, you are gone. This faculty can be cultivated. We all have to cultivate it more or less. Those of us who are good for anything have a temper, a pretty big temper, too. And those of you who have succeeded in doing anything it is because you have been able to control yourselves. You are masters of yourselves. If you wish to say anything unpleasant to your learned friend upon the other side, if you wish to castigate him, make an effort to see how politely you can do it. Don't flay him, but cut him and lacerate him with the scimitar. Don't strike a blow with the bludgeon. When you do cut, cut keenly, sharply, so that everybody can feel it as your sword swishes through the air. Thus you see, where you have kept your temper and been so very polite to this gentleman you have maintained your own dignity and you have made him feel despicable.

Now the first thing you have to do is to open your case. Some people think you have to hold the thing back, that you don't want to disclose your case. You want to make your opening just as brief as possible; just enough to comply with the rule. Now, what

in the world do you bring your case into court for? Do you bring it there to hold it back? You bring it there that the court and jury may understand it and generally, you. That is what you bring it for——in order that it may be presented. It is my theory that the case should be most fully presented——not by any florid speeches; that is a thing of the past; this is a business age; but tell the facts, clean cut and as concisely and as clearly as possible, just what the case is and what the law is as you claim it to be and how you expect to establish your case; and sit down.

* * * * *

Write out your statement; read it over; strike out all the unnecessary words. We have not time in these days to listen to arguments by the hour. We have not time to listen now to long perorations and classic quotations. You have fifteen minutes to present this case. You have to do it in fifteen minutes or you do not do it at all. That is what the supreme court of the state allows on arguments except in cases where the records and the briefs are printed. And if you only try you will be astonished to see how much you can say in fifteen minutes.

“But,” you say, “I want to be an eloquent and persuasive man.” Oh, don’t trouble yourself about that at all. That is not what you want. You want to be a modern trial lawyer. You don’t want to be a grandiloquent old man.

Having made your opening, and examined your witnesses, you then come to the closing arguments. I do not think that the closing is so great an advantage as some seem to think. I would rather have the opening argument. The first impression can then be made so strong that it will be almost impossible to overcome it. When I came to the bar in Detroit, a case that would take 10 days for the testimony would take 2 days to argue. Now the last long jury case that I tried, the testimony took two days; the arguments lasted three hours—an hour and a half to each side. Each side had ample time to say all that they wanted to say; and if I had been required to say it all in three-quarters of an hour I think I could have done so.

* * * * *

I wish I might impress upon you what I said in the beginning; that you have your future entirely within your own hands. There are some of you, undoubtedly, who are not fitted for the practice of the law; you will very soon find it out, and when you do find it out there is no reason why you should be ashamed or grieved. It

is not given to everybody to be a lawyer, any more than it is for every woman to be a prima donna, or for every man to be a great musician. Joe Choate cannot sing a solo in grand opera; I dare say he doesn't groan over it. I do not see why any of you should mourn because you cannot be lawyers. You may not be fitted for it by temperament; you may not be fitted for it mentally. There may be some profession for which you are better suited. Very well; let the law go. The experience and mental training you have had here will be of value to you, whatever your final career. There is no reason to grieve over what you cannot achieve; no reason to grieve over the impossible.

But any young man with a fair amount of health and a fair amount of common sense and a fair amount of diligence can achieve nearly anything in the practice of the law, provided always he is honest and faithful to his obligations and to his profession. Now you are all here together; one inspires the other, one encourages the other. You are all big with hopes for the future. It is well that it should be so. I trust you may be able to take away with you the inspiration of this University and the inspiration of the mutual association and fellowship that surrounds you here. But in a very few months you are all to be scattered. Some of you will be alone, all by yourselves in some little town, without friends, without acquaintances; strangers in a strange land, possibly without much means, possibly penniless, and the future will look very, very dark to you.

Reflect that others have been there before you. You are not the only ones who have gone through the experience. Most of us have had a pretty hard time; I have had it myself. I had to sit up in bed in a cold garret, wrapped in my blankets, trying to seat a pair of breeches because I didn't have the money to buy a new pair. I have done it not once; I have done it a good many times, boys, and for years the thing looked pretty black. But stick to it. Never give up the ship. Every dark cloud has a silver lining. Keep forging ahead—never mind the obstacles, and you will get there; there is no doubt about it. Your success is as assured as the rising of to-morrow's sun, provided always you are faithful and industrious, honest to yourself and faithful to your profession and to others. May God give you grace to do these things.—*The Law Students' Helper.*

We beg to acknowledge receipt of the following publications :—

Canadian Law Times	for ..	... October.
The Bombay Law Reporter	„ ...	... November.
The Law Students' Helper	„ .	... October.
The Law Students' Journal	„ ...	... October & November.
Law Notes	„ .	... November.
American Lawyer	„ ...	... September.
Educational Review	„ .	September & October.
The Calcutta Weekly Notes	„ ...	... October & November.
The Punjab Law Reporter	„ ...	... November.
The Lawyer	„ ...	... October & November.
Case and Comment	„ ...	... August & September.
Law Magazine and Review	„ ...	... November.
American Law Review	„ ...	... September & October.
Medico-Legal Journal	„ .	September.
Malabar Quarterly Review	„	September.
The Indian Review	„ ...	... November.

Law of Torts, 5th Edn., 1902, by *Fraser*. Published by Sweet and Maxwell, Ltd.

Principles of Circumstantial Evidence, by *William Wills*. Published by Butterworth & Co.

Law of Landlord and Tenant, by *Benz Pershad*.

A Popular Guide to Civil Courts, by *Syed Rustom Ali*.

Transfer of Property Act (Case Noted), by *R. Mitchell*.

Elements of Contracts, by *Carter*. Published by Sweet & Maxwell, Ltd.

General Report on Public Instruction in the United Provinces of Agra and Outh for the year ending 31st March 1902.

Census Report of India (Madras) 1901 . Vols. XV, XV-A and XV-B

way, are not to be referred to in the interpretation of the Act, are re-printed at length. We commend the book to the profession.

Law Examination Manual No. 2. Hindu Law BY *Trikamlal R. Desai*, B.A., L.L.B., published by Messrs. Ramachandra Govind & Sons, Publishers, Kalbadavi Road, Bombay, price Rs. 2

We do not know what use this book is intended to serve. We must confess we are altogether against publications of this kind. But when a book of this class contains mistakes grammatical, literary and legal, it cannot be too strongly condemned. We trust the author will not repeat an experiment of this description.

Admiralty Practice. By Williams and Bruce.—We have received from the well-known English Publishers Sweet and Maxwell Ltd., a copy of the 3rd edition of William and Bruce's Admiralty Practice. The value of this book in a commercial country like England cannot be too highly estimated. That Mr. Justice Gainsford Bruce has, amidst his arduous duties as puisne Judge of the High Court, been able to find time for the preparation of this 3rd edition is a circumstance which ensures the maintenance of the high standard of excellence which the book has attained. The chief value of the book is in part II treating with the practice in Admiralty. It may be that in India there is not much occasion for the profession to make reference to a book of this description. But the High Courts exercising Admiralty jurisdiction under the Charter and the practitioners attached to them will find the book of immense value.

We beg to acknowledge receipt of the following publications :—

Canadian Law Times	for ...	... September.
Indian Review	" ...	... Do.
The Bombay Law Reporter	" ...	... September & October.
The Law Students' Helper	" ...	... August & September.
Canada Law Journal	" ...	... September.
The Law Students' Journal	" ...	... Do.
The Kathiawar Law Reports	" ...	... Do.
Law Notes	" ...	... September & October.
American Lawyer	" ...	... August.
Educational Review	" ...	... September & October.
The Digest	" ...	... Do.
The Calcutta Weekly Notes	" ...	... September.
The Punjab Law Reporter	" ...	... September & October.
The Lawyer	" ...	... September.
The Indian Review	" ...	... Do.
Journal of the Society of Comparative Legislation	for ...	... July (No IX.)
The Indian Journal of Education		... August
Admiralty Practice		... <i>Williams and Bruce.</i>
Hindu Law		... <i>Trikam Lal R. Desai.</i>
Hindu Reversioners' Suits		... <i>V. F. Venkatachellum Aiyar.</i>
Law of Master and Servant		... <i>Charles Manley Smith.</i>
Mortgage Suits		... <i>M. L. Agarwala.</i>
Succession Certificate Act		... <i>N. Swaminadhan.</i>

The Madras Law Journal.

PART XII.]

DECEMBER, 1902.

[VOL. XII.]

CONTRACT ACT, S. 69—ACTION FOR MONEY PAID BY PERSON ONLY MORALLY LIABLE.

THE case of *Vaikuntam Ammangar v. Kallapiran Ayyangar*¹ is an authority for the position that a person who is under a moral obligation to do something may, upon discharging such obligation, reimburse himself under S. 69 of the Contract Act from a person who is under a legal obligation to do the same. There is a growing opinion among the members of the bar that this decision is not altogether sound. In order to see whether the construction placed upon this section of the Contract Act is correct (and it may be observed that this construction was reiterated in S. A. No. 1004 of 1901) we have to consider the cases in which a contract is implied in law by the English Courts. Indeed this section together with the other sections in Chapter V of the Contract Act represents the class of cases known in the English Law as implied contracts or as contracts *quasi ex contractu* in the Roman Law. The term 'implied contract' must here be understood in the sense of a contract implied by construction of law, and not of a contract inferred from the express words, conduct or understanding of the parties. As observed by Mr. Leake in his well-known book on Contracts (page 9), "It is necessary here to notice that the term 'implied in law' is used to denote the class of simple contracts raised by law from facts and circumstances independent of agreement, and in which an agreement or promise, if implied at all, is an implication of law only, and has no existence in fact." Again at page 54 he says, "The promise here implied is, however, a fiction of law, and therefore requires to be distinguished from the implied promises already mentioned in which the promise is an implication or inference of fact, and which are termed implied promises merely to distinguish them from express promises or

1. I. L. R., 28 M. 512.

promises expressed in words.” The expression ‘implied contract’ is rather unfortunate.¹ It would have been more scientific to style the liability as a “constructive contract.” The expressions “Obligations resembling a contract” occurring in the heading of Chapter V, Indian Contract Act, though long, more aptly express the nature of this class of implied contracts.

There are several classes of cases known to the English Law as implied contracts. One of such cases is the implied contract for money paid for the use of another. In such cases an action of assumpsit was said to lie at the instance of the person who paid money for the use of another. An assumpsit is, according to Bacon², “an action which the law gives a party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract, either express or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. But here it must be observed that the law distinguishes between a general *indebitatus* and a special *assumpsit*; for though they come under the denomination of actions on the case, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature and will lie in no case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special assumpsit must be brought.”³ We are not concerned with this distinction, and although the old actions are abolished and are now only a matter of history, it is useful to see in what cases the old action of assumpsit was held to lie where money was paid for the use of another.

Where the payment is made at the request, express or implied, of the person for whom or for whose benefit it is made, then there is a contract arising from the agreement of the parties. But

1. Per Cotton, L. J. in *Rhodes v. Rhodes*, 44 Ch. D. 94.

2. See Encyclopædia of the Laws of England Vol. I:—General Introduction of Professor Pollock, pp. 10 and 11.

3. Abridgment Vol. I, pp. 256 and 257.

4. See also Chitty on Pleading, p. 295; 1 Saund, pp. 357 and 358, note (d).

^{*} *Moses v. Macferlan*, 2 Burr 1005; Per Parke B. in *Powder v. Butcher* (1829), 34 R. R; 432 (439); and *Lewis v. Campbell*, 8 C. B. 541 (550), Per Littledale, J. in *Bennett v. Lynch*, 5 B. & C. 609, 610.

though we are not now concerned with this class of cases, it is useful to see under what circumstances an action of assumpsit was held to lie in these cases so that we may be guided by analogical principles in the cases of request inferred by implication of law.

In *Brittain v. Lloyd*¹, it was observed in the judgment of the Court: "It is clear that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, as where he is placed by him under a liability to pay and does pay, makes no difference. If one asks another, instead of paying money for him, to lend him his acceptance for his accommodation and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay; and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it." It was said by *Parke, B.* in *Sleigh v. Sleigh*² that "to make a person liable in this form of action for money paid to the defendant's use, the plaintiff must not merely show, that the money paid discharges *pro tanto* the liability of the defendant to the holder of the bill, but also that it was paid at the request, express or implied, of the defendant." But as observed by *Wilde, C. J.*, in *Lewis v. Campbell*³, this proposition is not universally true "inasmuch as there are many cases, as observed by the Court in the case of *Brittain v. Lloyd*¹ in which the action can be maintained, though the defendant has not been relieved from a liability; i. e., all the cases in which,

1. 14 M. & W. 762. 2. (1850) 5 Exch. 514 (516). 3. (1849) 8 C. B. 541.

though no such relief from liability occurs, a request to pay, and a promise to repay, are expressed or implied." The relief from a pre-existing liability is not necessary in cases where the request is express or is implied from circumstances. Whether it is equally not necessary in cases where the request is one implied by inference or fiction of law, it is immaterial here to consider as in the case on hand there is an undoubted relief from a pre-existing obligation or liability which is not merely *moral* but also *legal*.

One thing, however, is necessary, and that is that there should have been an actual payment of money, or that which is equivalent to it, to a third party. Anything short of payment, or of something which amounts to payment will not do.¹

It may, however, be stated that in cases where the request is implied by a fiction of law, the payment must, if made without or against consent, be made in discharge of a legal liability of the person for whose benefit it was made. For, as observed by *Willes, J.*, in delivering the judgment of the Court in *Johnson v. Royal Mail Steam Packet Company*² "There is, upon the surface, that by the law of this country, differing, it is said, in that respect from the Civil Law, nobody can make himself the creditor of another by paying that other's debt against his will or without his consent; that is expressed by the common formula of the count for money paid for the defendant's use, *at his request*. That is the general rule undoubtedly, but it is subject to this modification, that money paid to discharge the debt of another cannot be recovered unless it was paid at his request, or *under compulsion, or in respect of a liability imposed upon that other*." In the absence of a request then, the two circumstances pointed out which will entitle a person to recover money paid for another are (1) compulsion and (2) the existence of a liability imposed upon the person for whom the payment is made.

Frequent applications of the doctrine are to be found in cases where a man's goods are taken in distress for another's debt, and he is obliged to pay the debt for preventing a sale, &c.³. So where

1. *Power v. Butcher* (1820), 34 R. R. 432.

2. L. R., 3 C. P. 38 (42).

3. *Exall v. Partridge* (1799) 4 R. R. 656; *Jefferys v. Gurr* 2 B. & Ad. 833; *Taylor v. Zamora* (1816) 16 R. R. 668; *Hunter v. Hunt* (1845) 1 C. B. 300; *Edmunds v. Wallingford* (1885) 14 Q. B. D. 811; *Johnson v. Wild* (1890) 44 Ch. D. 146, cases arising from composition with creditors are *Smith v. Cuff* 6 M. & S. 160; *Horton v. Raley*, 11 M. & W. 492; and *Bleaden v. Charles*, 7 Bing. 246.

one who is only secondarily liable to perform¹ (under compulsion of law) an obligation to which another person is primarily liable, he may recover against that other person². But the debt must be paid under legal compulsion, for no one can make himself the creditor of another merely by paying off his debt. For, as was said in *Lampleigh v. Braithwait*³ "a mere voluntary courtesy will not uphold an assumpsit, although a courtesy moved by a previous request will." In *Stokes v. Lewis*⁴ it was held that where a person pays money to another upon one's account without his request, assumpsit would not lie without an express promise to repay it, for he might have a good reason to resist the payment of the money, and another person should not pay it for him whether he would or not. One other reason that might be said for this would be that it was not reasonable that one man should do another a kindness, and then charge him with a recompense. But this principle can hardly apply to cases, where persons are compelled to pay either because of a common or a secondary liability or because he is placed in a situation that his property is to be sold or otherwise adversely dealt with.

This, however, does not solve the difficulty that lies in the judgment of the High Court in *Vaikuntam Amangar v. Kallapiran Ayyangar*⁵, for, in order to support the judgment it is essential to see whether a person who is under a mere moral obligation can pay the amount legally and primarily due by another and recover the amount so paid from the latter. For this purpose it is essential to consider the basis of this action for money paid. In *Moses v. Macferlan*⁶ Lord Mansfield in answer to an objection raised by counsel that no *assumpsit* lay except upon an *express* or *implied* contract, observed: "If the defendant be under an obligation, from the ties of natural affection to refund, the law *implies a debt*, and *gives this action*, founded on the equity of the plaintiff's case, as *it were upon a contract* ('*quasi ex contractu*' as the Roman law expresses it)." These observations were made in a case in

1. For cases of execution of lease or mortgage in which the lessee or mortgagor is by custom liable to pay the charges of the solicitor of the lessor or mortgagee in drawing up the document, though the lessor or mortgagee may be liable by contract, see *Grissell v. Robinson* (1836) 43 R. R. 574; *Wales v. Carr* (1902) 1 Ch. 860.

2. Per Willes, J. in *Roberts v. Crowe*, L. R., 7 C. P. 629 (637).

3. 1 Sm. L. C., 186.

5. I. L. R., 23 M. 512.

4. 1 T. R., 20.

6. (1760) 2 Burr. 1005 (1008).

which the action was for money had and received. But this form of action is only similar to the action for money paid. This was pointed out by *Maule, J.* in the course of the argument of the defendant's counsel in *Lewis v. Campbell*¹ : "Where money is received under circumstances which make it right and equitable that it should be returned, it may be recovered back on a count for money had and received. May it not also be said, that, where money has been paid under circumstances which make it just and equitable that it should be repaid, it may be recovered back on a count for money paid?" Professor *Keener* in his article on "*Quasi-contract, its nature and scope*," observed that quasi contracts, at least a class of them, may be said to be founded "upon the doctrine that no one shall be allowed unjustly to profit or enrich himself at the expense of another."²

With this guiding principle before us let us examine some of the cases in which it has been held that an action for money paid lies.

In *Johnson v. Royal Mail Steam Packet Company*³ the facts were : The plaintiffs were the mortgagees of two steam vessels. The defendants were in possession of the vessels in pursuance of a subsequent agreement with the mortgagors that they should work the vessels until further notice paying all expenses and receiving all profits. Subsequently the plaintiffs gave notice that the vessels should be delivered to their agent at Sydney. The vessels were then at Suez bound for a voyage to Sydney, and the defendants delivered the vessels on arrival at Sydney. At the time of delivery there was a sum of about £5,000 due by the defendants for wages of the officers and crews of the vessels. For these wages the latter had a maritime lien, and the amount not having been paid, a suit was brought in the Vice-Admiralty Court at Sydney and the vessels seized at the instance of the officers and crew. The plaintiffs paid the money and now sued the defendants for money paid. The Court (consisting of *Willes, Byles* and *Keating, JJ.*) held that the action was maintainable. *Willes, J.*, in delivering the judgment of the Court observed : "The compulsion of law which entitles a

1. (1849) 8 C. B. 541 (545).

2. This subject, it seems, he has discussed in greater detail in his book on the Law of Quasi-contracts which apparently is not available here.

3. (1867) L. R., 3 C. P. 38.

person paying the debt of another, to recover against that other as for money paid, is not such a compulsion of law as would avoid a contract, like imprisonment. It has been decided in numerous cases that restraint of goods by reason of the non-payment of the debt due by one to another is sufficient compulsion of the law to entitle a person who has paid the debt in order to relieve his goods from such restraint to sustain a claim for money paid Without heaping up authorities where it has been held, independent of contract, that a person occupying a property in respect of which there is a claim that ought to have been discharged by another, being compelled to pay, is entitled to reimbursement, we think that this is a case in which the mortgagees, by compulsion of law, have paid a debt for which the Royal Mail Company (defendants) were liable, a ready money debt which they ought to have provided for on the arrival of the vessel at Sydney, and that, therefore, in respect to the claim for wages the plaintiffs are entitled to recover as on the count for money paid."

In this case the plaintiffs had an interest in the property, and the money was paid to protect such interest. In the case suggested by way of illustration by *Willes, J.* in *Johnson v. Royal Mail Steam Packet Company*¹ the money is paid also by a "person interested in the property" and he is therefore said to be entitled to sue for money paid. The case suggested in the very words of *Willes, J.*, was this: "A lends B his horse for a limited period, which would imply that he must pay the expense of the horse's keep during the time he retains it. B goes to an inn and runs up a bill which he does not pay and the innkeeper detains the horse. In the meantime, A has sold the horse out and out for its full price to C, and C is informed that the horse is at the inn; he proceeds there to take him away, but is told he cannot take him until he pays the bill, and he pays the bill accordingly and takes the horse." The learned Judge says that C will be entitled to sue B in an action for money paid.

It may be observed that in the above cases the person who pays is neither primarily nor secondarily liable. He is not liable at all. He pays because of his interest in property. In the second case though he is not obliged to pay and need not pay at all, yet

1. (1867) L. R. 3 C. P. 88.

unless he pays he cannot get possession of the property. An adverse detention of the property in which a person is interested by another who holds it until his claim is satisfied is a compulsion, which will justify the payment and entitle a person upon such payment to claim in an action for money paid. (See *The Orchis*).¹

The above principle is more neatly stated by *Lindley*, L. J., who delivered the Judgment of the Court of Appeal in *Edmund v. Wallingford*.² The facts were the defendant bought the business of an iron-monger in his name but for the benefit of his son, William. He was assisting and managing the business, and his wife and, for some time, he himself were residing in the place of business. The defendant's sons carried on the business as partners, and in execution of a decree against the defendant the goods on the business were seized. The sons put in a claim which was thrown out as barred. The goods seized were sold and realized £ 1,300. The sons were declared bankrupts, and the plaintiff was their trustee in bankruptcy. The defendant agreed with the plaintiff in consideration of the son's goods having been seized and sold to pay £ 300 per annum to the plaintiff for being paid to the trade-creditors of the sons until the debts due to the creditors were discharged. The plaintiff now sued to enforce this agreement or in the alternative to recover from the defendant £ 1,300, the value of the goods seized. It was held that the plaintiff was entitled to enforce the agreement, there being a valid consideration for the same. *Lindley*, L. J., observed (p. 814): "Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor." The Lord Justice then refers, as instances illustrating the application of the principle, to the case of a person whose goods are lawfully distrained for rent due from some one else, to the case of a surety paying the debt of his principal, to the case where the whole of a joint debt is paid by one only of the joint-debtors, and to the case where the joint property of a firm is seized for the separate debt of one of the partners, and points out that the right to indemnity or contribution exists in these cases notwithstanding

1. 15 P. D. 38.

2. 14 Q. B. D. 811.

there may be no agreement to indemnify or contribute. This right may be excluded of course by contract, but that is beside our point.

As regards the meaning of lawful seizure he observed : " When it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place ; it is because as between them the wrong goods have been seized that any question arises."

The above statement of the law was fully adopted by the Court of Appeal in the case of *The Orchis*.¹ *Butt*, J., deciding the case as a judge of the original trial stated the principle thus : " If a man is entitled to possession of a chattel, and can only get possession of that chattel by paying a debt which another is legally compellable to pay, and he does pay that debt, the law will imply a promise on the part of the other to repay him what he so disburses." *Lord Coleridge*, C. J., states the principle thus in the Court of Appeal : " When there is a seizure rightfully made as between the parties (rightfully, I mean, in point of law), then the person who claims for money paid in extricating property of his own from being subject to what is a lawful seizure—if in extricating that property he pays money for the benefit of somebody else—is entitled to recover the amount from such person." *Lord Esher*, M. R., states the principle in more concise language : " The principle" is " if by reason of the default of one person the property of another become subject to seizure by law, if the person whose property is thus seized by a right process of law in consequence of the default of another pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who paid it." We have been led to quoting these passages which, however, illustrate the same principle on account of the clearness of the language employed which brings the principle itself into prominent relief. In many of the cases above cited the plaintiff is not legally compellable to pay, nor is he even morally obliged to pay. The right to recover arises only because he is not liable, and the ground of liability is because the payment is made under pressure by a person

1. 15 P. D. 38.

interested. In other cases he may have been compelled or have been compellable to pay and the ground of liability is, in such cases, owing to the fact that he is interested in making the payment, i. e., that though he is compellable or is compelled, it has been arranged that some other should be liable as where he is only an accommodator or is jointly liable and as between himself and the debtor the latter is bound to pay either the whole or part of the debt.¹

He is not, however, a pure volunteer in the sense that he is not interested in making the payment, but the interest that appears in the above cases is an interest in property or an interest created purely by contract as in the cases of surety and joint-debtors.

The case of *Sleigh v. Sleigh*² is important in this connection and must be more closely scanned. The facts of that case were these: The plaintiff in order to accommodate the defendant drew and indorsed a bill of exchange for £ 100 and delivered the same to the defendant who negotiated it. It was not paid by the defendant on maturity. The holder did not give notice of dishonor to the defendant nor to the plaintiff. The plaintiff gave notwithstanding £ 25 in partial discharge of the bill and sued the defendant in an action for money paid for defendant's use. The defendant contended that the plaintiff was not compellable, much less compelled, to pay as he was not bound to pay unless notice of dishonor was given and would be discharged if the same were not given and that, therefore, the payment was a mere voluntary payment which will not entitle the plaintiff to recover. The court held that the defendant was not liable. It would be useful to see what the ground of the judgment was. *Parke, B.* observed: "To make a person liable in this form of action for money paid for the defendants' use, plaintiff must not merely show that the money paid *pro tanto* discharges the liability of the defendant to the holder of the bill, but also that it was paid at the request, express or implied, of the defendant." We are unable to understand what the learned Barou meant by saying that there must be a "request, express or implied, of the defendant." Apparently, he meant that the promise should be one arising by implication from facts. If this was his meaning, we should say his state-

1. *Bates v. Townley* (1848), 2 Exch. 152.

2. (1850) 5 Exch. 514.

ment of the law is not correct as regards contracts resulting from the union of two minds which may be proved by the expressed language of the parties or by their acts or other circumstances. For, as has been already observed by us, a person may ask us to pay another some money which the first person intended as a gift, and if we pay the money we should be entitled to recover the same, though in such a case no liability of the person for whom the money is paid has been discharged. But if the statement of the law be intended to have reference to quasi-contracts, then there is no meaning in saying that there should be a request, express or implied of the defendant. For, in all cases of quasi-contracts, the liability arises as already observed notwithstanding the absence of any intention on the defendant's part and in many cases in spite of his actual dissent. In the old forms of actions of assumpsit, where it was necessary to aver 'request,' it was by a pure fiction of law the request was implied to enable the plaintiff to be entitled to the remedy, and it is only a pure fiction to regard the liability as one on contract.

Then the learned Baron proceeds to say: "Now there is no doubt, that, if a person lends his name to another for his accommodation the party accommodated undertakes to pay the bill at maturity, and further to indemnify the person accommodating him, in case that person is compelled to pay the bill for him, and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder may not actually compel him to do so; and after payment, he may sue the party accommodated for money paid on his account..... Where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonor to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant."

Shortly stated the ground of non-liability in this case was that the plaintiff was not placed in any situation recognised by the law in similar cases *i. e.*, there was no compulsion or pressure; and there was neither compulsion nor pressure, because the plaintiff was not compellable to pay the money, there being no notice of dishonor. The plaintiff's counsel stated that the plaintiff was under a moral

obligation to pay the bill as a drawer. To this no express answer was given but the reason given by the Baron that he was not compellable (*i. e.*, legally) might be taken as a sufficient answer. It may also be an open question whether a surety who is legally discharged by reason of want of notice of dishonor is in any way morally bound.

The defendant as the acceptor of the bill was still liable and, upon this view it is difficult to see how the mere fact that the plaintiff was a person not compellable to pay made his payment a mere voluntary payment. There is authority for the view that the test of liability in such cases is to see not whether the plaintiff was liable with the defendant jointly or secondarily at the time of payment, but whether he was so liable at the time of the original loan.¹

The case may be regarded as authority for the proposition, that where the plaintiff is not placed in a situation recognised by the law as entitling him to pay for another, as where there is neither compulsion nor pressure, he will not generally be entitled to recover money paid by him for another's use. It cannot be said to be an authority for the proposition that a person who is only under a moral obligation to pay will not be entitled to recover in an action for money paid. The court says that the plaintiff if he pays the whole amount of the bill will be entitled to recover not in an action for money paid but in an action upon the bill. In consequence of the payment he will be entitled to be subrogated to the rights and securities of the principal creditor. He has also rights not possessed by the principal creditor. He is entitled to bring his own suit against the debtor upon payment. This, however, would seem to be negatived by the court in the above case. This case was rightly commented on adversely if not altogether dissented from by *Thesiger*, L. J., in *Ex Parte Bishop*.²

There are several classes of cases, in which a payment is made by a person who is not compelled or compellable to pay by law and yet he will be entitled to recover the money from the person for whose benefit or use it is made.

For instance, in the case of necessities supplied by a person to another whom he knows to be a lunatic, it has been held that

1. See cases cited in para 2, page 611 of Vol. X, Encyclopædia of the laws of England.

2. (1880) 15 Ch. D. 400 (419).

the person furnishing necessities is entitled to recover the value of the same from the lunatic or his estate. It is on the theory of quasi-contract founded on the doctrine of unjust enrichment that the lunatic is held liable and as pointed out by Professor *Keener* in his article on Quasi-contract¹, this is evident not only from the fact that he has no contracting mind, but also from the fact that he is equally liable for necessities furnished at a time when there was no attempt on his part to contract. Here it may be observed that there is no legal obligation on the part of the person supplying the necessities to furnish the same and yet he is held entitled to recover not upon the ground of an actual contract but upon the ground of an obligation imposed by law without reference to any contract.

That this is the correct nature of the obligation is seen by the decision of the Court of Appeal in *Rhodes v. Rhodes*². The action was to recover money paid for necessities supplied to a person known to be a lunatic. The Court held that he would be entitled to recover, if the payments were not intended to be bounteous. Lord Justice *Lindley* observed: "The question whether an implied obligation arises in favor of a person who supplies a lunatic with necessities is a question of law, and in *In re Weaver* (21 Ch. D. 615) a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law owing to which the expression "implied contract" has been used to denote, not only a genuine contract established by inference, but also an obligation which does not arise from any real contract but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians "*obligationes quasi ex contractu*." Lord Justice *Cotton* observed: "The term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The

1. 7 Har. L. Rev. at p. 71.

2. (1890) 44 Ch. D. 94.

answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities. I think that the expression 'implied contract' is erroneous and very unfortunate."

Monies paid by a person for necessities supplied to a lunatic may also be recovered on the footing of a *quasi* contract. But in order to entitle a person to recover he must have made the payment or supplied the necessities with the intention that it should be repaid. If the payments in question were intended to be bounteous, then no action for money paid would lie.

In the case of *Williams v. Wentworth*¹, Lord Langdale, M. R., observed: "I am of opinion, that in the case of money expended for the necessary protection of the person and estate of the lunatic the law will raise an implied contract and give a valid demand or debt against the lunatic or his estate and that under the circumstances of this case, a debt was constituted. A debt is constituted by reason of a contract, which, in such cases, the law will supply."

In *Howard v. Digby*² where the claim was for necessities supplied to a lunatic before he had been so found by inquisition, Lord Brougham observed: "Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties, but because they are debts; because in the eye of the Court, be it a Court of law or a Court of equity or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person and are discharged by the justice of the Court."

The obligation of an infant to pay for necessities is also of a quasi-contractual nature. It is usual to state that an infant is bound by his contract for necessities. This is necessarily erroneous. The obligation of the infant is not to pay the stated price but only the reasonable value of the necessities. So that where an infant gives a note in payment for necessities or makes an express promise, the real value will be enquired into and the infant will only be held liable for that amount.

1. 5 Beav. 325 (329).

2. 2 Cl. & F. 684.

The infant is held liable on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; so that if, as a matter of fact, the infant is supplied with necessaries by some other person, the infant will not be responsible if any one supplies him other board or clothing, although such person did not know that the infant was already well supplied¹. *Kay, J.*, observed in *Rhodes v. Rhodes*²: "Take the case of an infant. He cannot enter into any binding contract at all; and yet a binding contract is implied on the part of the infant whose necessaries are supplied, the contract being by implication of law The law does bind him by a contract for the supply of necessaries." Here again it may be observed that there is no obligation enforceable at law on the part of the person making payment³ or supplying necessaries to make the payment or to supply the necessaries.⁴

Again a husband is liable for necessaries supplied to a wife whom he has deserted or compelled to leave him⁵. The true nature of this liability is also, as observed by Professor Keener, based on quasi-contract. It is not correct in such cases to say that the wife is authorized to pledge the credit of her husband. Upon this Professor Keener observes: "Since, however, the husband may be liable for necessaries furnished even though the wife made no attempt to pledge his credit,—as, for example, for necessaries furnished to a deserted wife while she is unconscious;—and since, furthermore, the husband is held liable for necessaries furnished to a wife while he is incapable of contracting,—as where necessaries are furnished to a wife while the husband is insane (*Read v. Legard*, 6 Exch. 636),—the better form of statement would seem to be simply that an obligation is imposed by law upon the husband to pay for necessaries furnished in such circumstances." He then supports his statement by passages from the judgment of *Hoar, J.*, in *Cunningham v. Reardon*⁵.

1. Cf. this with regard to the liability of a husband for necessaries supplied to the wife when the latter is supplied with necessaries by the husband. *Reeve v. Cunningham*, 2 Car. & K. 444.

2. (1890) 44 Ch. D. 94.

3. As to the rights of this person to sue see *Darby v. Boucher* 1 Spk. 270; *Marlow v. Pitfield*, 1 P. Wms. 558; and *In re National Permanent Benefit Building Society*, 5 Ch. App. 318.

4. See *Hodges v. Hodges*, 4 R. B. 889; *Emery v. Emery* (1827), 30 R. R. 834; *Baker v. Sampson*, 14 C. B. N. S. 383; *Deare v. Sutton* (1869), L. R. 9 Eq. 151 and *Robison v. Gosnold*, 6 Mod. 171 (1705).

5. 98 Mass. 538.

The liability extends even to a case where the payment or supply is made with the knowledge on the part of the person paying or supplying that the husband does not intend to pay therefor. So also an obligation is imposed upon the father to pay for necessities furnished to a child whom he has refused to support. Thus Chancellor *Kent* observes in his well-known book "Commentaries on American Law" (12th Edn., 1896, Vol. II, p.193). "A father is not bound by the contract or debts of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one." And then in note (x) he says, "A parent is liable for necessities supplied to his minor child only when he has refused to supply them to the child, or when the child lives away from home with his consent." Then he goes on to say, "Where the infant is *sub potestate parentis*, there must be a clear omission of duty, as to necessities, before a third person can interfere, and furnish them, and charge the father... . If the father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage, he is liable for their necessities." For this position he relies upon *Rawlins v. Van Dyke*¹ and *Staunton v. Willson*². The case of *Baker v. Keen*³ was a case in which the authority was implied as an inference of fact. *Mortimer v. Wright*⁴ was a case in which there was, if any, a moral obligation on the part of the father to provide for his son aged 20, and it was held that from such moral obligation, no inference can be made that he authorised the son to pledge his credit. Here it may be observed that naturally the language of Chancellor Kent is not quite accurate. Where the father refuses there can be no question of authority given by him to supply necessities, but the liability of the father arises by operation of law. It may also be observed that in the above classes of cases again, there is no duty on the part of the person to make the payment or to supply the necessities and yet he is held entitled to recover the money paid for necessities or the value of the necessities furnished in an action for money paid.

There is again another class of cases from which it will appear that it is not essential that the person who pays need be under any legal obligation to pay, and yet, under the circumstances under

1. 3 Esp. 252.

2. 3 Day 37.

3. [1819] 2 Stark 501.

4. [1849] 6 M. and W. 482.

which the payment was made, he will be entitled to recover the amount so paid. For instance, where a wife is away from her husband's home, a person who performs her funeral according to her and her husband's position and incurs expense for her decent burial, will be entitled to recover the expense from the husband in an action for money paid.

Thus in *Jenkins v. Tucker*¹ the facts were these :—The defendant married the plaintiff's daughter. Some time after marriage, the defendant went to *Jamaica* leaving her and an infant child in England. He left the wife in bad health and much in want of money. The defendant had a large estate in *Jamaica*. The wife had contracted debts for her maintenance, &c. She died and her father defrayed the expenses of the funeral and discharged the debts contracted by her. He now brought this suit against the defendant on assumpsit. The argument was only confined to the question of funerals. The other question was left over for future consideration. The court held that the defendant was liable. *Lord Loughborough* observed at page 94 : "I think there was a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in the discharge of a duty which the defendant was under a strict legal necessity of himself performing, and *which common decency* required at his hands ; the money therefore which the plaintiff paid on this account was paid to the use of the defendant. *A father seems also to be the proper person to interfere in giving directions for his daughter's funeral in the absence of her husband.*" *Wilson, J.*, in the same case observed : "If the plaintiff in this case had declared as having buried the deceased, the husband would clearly have been liable, and as the case stands at present the plaintiff having defrayed the expenses of the funeral, the husband is in justice equally liable to repay those expenses, and in him the law will imply an assumpsit for that purpose."

A similar liability is cast upon an executor in possession of assets where an undertaker performs the funeral of the deceased².

1. (1788) H. B. 191

2. *Tugwell v. Heyman*, 13 R. R. 810, and *Rogers v. Price*, 32 R. R. 729. It would seem that the executor is liable even though he never receives assets to the amount of funeral expenses and even though he has not ordered the funeral. Per *Jessel, M. R.* in *Sharp v. Lush* (1879), 10 Ch. D. 472. But see the criticism on this case by *Whitehead* in his book on 'Church Law' p. 51.

It is upon this analogy that the husband was made liable in a later case which also followed the earlier case of *Jenkins v. Tucker*. The later case referred to was that of *Ambrose v. Kerrison*¹. The facts were these :—A husband and wife (Mr. and Mrs. Kerrison) separated. The wife died and before her death she gave directions as to the place of her burial. A friend of hers, one Gale, sent for the plaintiff, a person who resided at the place where she wanted to be interred and a distant connection of hers. This person expended the money required for the funeral and interred her at the family vault in the place mentioned by her and sued the husband for the expenses. The court held that he was entitled to recover the same. *Jervis*, C. J. observed (page 779) : “ There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract. That liability in the executor is founded upon the duty which is imposed upon him by the character he fills, and a proper regard to decency and to the comfort of others. And I think the same reasons which call upon the executor to perform that duty cast at least an equal responsibility upon the husband of a deceased wife, and without any express authority or request on his part, compel him to recoup one who has performed the funeral. I see no difference in principle between the case of an undertaker and that of a third person who takes upon himself to employ and to pay the undertaker. In point of fact, the undertaker does not do all the work himself : he employs others to assist him. If, therefore, the circumstances of this case would cast a duty upon the husband to pay an undertaker, which, I think, they do, it seems to me, upon the reason of the thing as well as upon the authority of *Jenkins v. Tucker*, that this plaintiff, though a *volunteer*, is equally entitled to maintain an action against the husband for money paid.’ Apparently *Cresswell*, J. would object to the use of the word *volunteer*. For he observed (780) “ This is not exactly the case of a payment made by a mere volunteer : the plaintiff is the party who performed the funeral at his own expense.” In this sense there is really no conflict between the two judges. *Jervis*, C. J., only meant by *volunteer* that plaintiff was not a person legally compellable to incur the expense.

1. (1851) 10 C. B. 776.

In *Bradshaw v. Beard*¹ the above two cases were followed. The facts were these. The wife was living apart from her husband. They were not parted by mutual consent; nor did the wife leave her husband's roof in consequence of any cruelty or other misconduct on his part. She left voluntarily, it is stated, under very peculiar circumstances. She was living in the house of her brother for a considerable number of years and died. The husband who was at the distance of a mile was aware of the death. He was not applied to and never took any steps. The brother employed an undertaker and buried her in a suitable manner. He now sued the husband for the expenses. It was held that the husband was liable. *Erle, C. J.*, observed (347): "It is clear to my mind that the husband was liable for the amount expended by the plaintiff for the purpose. The case of *Ambrose v. Kerrison*² is precisely in point. There, as here, the husband might have been applied to to bury his wife, and yet the court held that he was bound to recoup the person who had taken upon himself the performance of that duty." The observations of *Willes, J.*, however, would seem to shew that in this case there was the additional circumstance that the plaintiff in whose house the death took place was under a legal duty of burying the deceased though he might not be primarily liable. For it would seem on the authority of *Queen v. Steward*,³ cited by *Willes, J.*, that "every person dying in this country (England), and not within certain ecclesiastical prohibitions, is entitled to Christian burial and, where no such prohibition attaches, it seems that every householder in whose roof a dead body lies is bound by the common law to inter the body decently and that, upon this principle, where a body lies in the house of a parish or union, the parish or union must provide for the interment." But notwithstanding this the decision would appear to have been based by *Willes, J.*, even irrespective of that circumstance. For he observes, "Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the laws of nature and society make a moral duty. And upon his default, the law obliges him to reconp the reasonable expenses of the person who performs it for him." After pointing out that this stands on a quite different footing from the case of an executor being liable, he observes with

1. (1862) 12 C. B. N. S. 344. 2. 10 C. B. 776. 3. 12 A. & E. 773.

reference to the argument that a stranger may, in the event of the doctrine being upheld, thrust himself in between the husband and the wife to prevent the husband from doing the duty cast upon him, "I feel no alarm that this doctrine may induce a stranger to thrust himself in between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking parties are not allowed to claim in respect of moneys expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud in concealing from the husband the fact of his wife's death and so preventing him from performing the last duty to her remains, the case would have presented a different aspect."

It may also be observed that in cases of necessity, a stranger may direct the funeral and defray the expense out of the deceased's effects without rendering himself liable as *exécuteur de son tort*.¹ Upon this principle even an infant husband is liable for the funeral expenses of his wife, and these are said to be "necessaries" within the meaning of the rule, that an infant is liable for necessaries. So an infant widow may be liable for the funeral of her husband who has left no property to be administered.²

There is yet a class of cases in which it has been held that a person who has employed an agent to make bets is liable to pay to the latter the moneys paid by him to the winner though the latter may not be entitled to enforce the payment from either the agent or the principal. The ground of liability was stated to be in the leading case upon that subject *Read v. Anderson*³ that "by the usage of the agent's business known⁴ to both parties at the time of the employment, and with reference to which usage the contract of employ-

1. Vin. Abr. 'Exécutor' 24; *Tugwell v. Heyman* (1812), 13 R. R. 810 and 2 Bl. Comm. 507.

2. *Chapple v. Cooper*, 13 M. & W. 252.

3. 13 Q. B. D. 779 (783).

4. See *Seymour v. Bridge* (1885) 14 Q. B. D. 460. But vide *Perry v. Barnett* (1885) 14 Q. B. D. 467 and affirmed by the court of Appeal in 15 Q. B. D. 388 where it was held that the custom being unreasonable the parties could not be presumed to be aware of the custom. It may also be observed that the principle of the decision in 13 Q. B. D. 779 was altered as regards betting agents by statute 55 & 56 Vict. C. 9, Gaming Act, 1892.

ment was made, the betting agent became liable as a matter of business to make good a lost bet at the risk of losing his character and customers." In answer to an objection that the payment of bet cannot be enforced by law, *Bowen*, L. J., observed in the same case: "I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognised by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken." The authority of the principal to revoke ceases on the making of the bet. That this though an extreme application of the law, is yet an undoubted principle of the law will be seen from the language of *Brett*, M. R. (who was the dissentient Judge in the above case) in the later case of *Leigh v. Dickson*¹ where it was held that one tenant in common was not entitled to sue for contribution in respect of money expended in ordinary repairs. The Master of the Rolls after laying down some cases where the law implied a request observed: "But the law has gone even further, and it has been held that if a principal employs an agent in a business, in which, by the usage thereof known to both parties at the time of employment, the agent, although he is under no liability by law, is bound, on pain of suffering an injury or loss in his business, to pay money, the principal is bound to indemnify the agent for the money which the latter may expend in the transaction of the business on his principal's behalf. That no doubt is an extreme case, but it has been so decided."

In all the above cases it may be observed that the person who has paid the money and sues to recover the money so paid is not compellable to pay. There is, if at all, only a moral obligation to incur the expense. And yet there was no objection made to the fixing of the liability that the payment was made by a person who was under no obligation to make it. There can be no stronger pressure than that of the social odium which the mother and her infant daughter would incur in case the marriage did not take place within a certain age. Moreover if the marriage is not performed the ward and the guardian may be liable to be sued for

1. (1884) 15 Q. B. D. 60.

damages for a breach of the contract to marry. If, under the circumstances, the guardians incur expense (which are refused by the person who is legally liable) there can be no stronger case of pressure entitling the person incurring the expense to recover from the person who is primarily liable and who has made default.

We think therefore that upon the authorities there can be no ground for supposing that to sustain a suit for money paid, it is in any way necessary that the person making the payment should be compellable to pay and there can be no doubt that in English Law and, for the matter of that in any system of jurisprudence, the person who makes the payment may be interested in any way. This being so the words "person interested" in section 69 of the Contract Act may be taken to mean not merely a person legally interested but a person morally interested and that, therefore, the ground of the decision in *Vaikuntam Ammangur v. Kallapiran Iyengar*¹ is right. We are not now concerned whether the words "payment of money" in S. 69 excludes a case of service done and whether S. 70 will alone apply to such a case. There is a conflict of authority upon the point in the Indian Courts².

After all the question whether the mother or the daughter is the proper person to sue is only one of procedure as the respondent's counsel in the case of *Vaikuntam Ammangur v. Kallapiran Iyengar*¹ seemed to admit; for the counsel would admit that the defendant was liable to the ward direct. The only objection was that the suit should have been framed not in the name of the guardian but in that of the ward as represented by the guardian. The admitted liability of the defendant in this case to pay to the infant the expenses of the marriage may be made to rest upon an obligation imposed by the Hindu Law and has no reference to the now prevalent doctrine of a moral obligation being converted by some magic into a legal obligation after a person's death which we reserve for discussion on a future occasion.

1. I. L. R. 23 M 512.

2. *Danodara Mudaliar v. Secretary of State* (1804), 1 L. R. 18 M. 88; *Smith v. Dinonath Mookerjee* (1885), I. L. R. 12 C. 213; *Nobin Krishna Bose v. Mon Mohun Bose* (1881), I. L. R. 7 C. 573; *Nath Prasad v. Baij Nath*, I. L. R. 3 A. 66.

NOTES OF INDIAN CASES.

Bell v. The Municipal Commissioners for the City of Madras—I. L. R., 25 M. 457:—The decision in this case is one of very considerable interest. The very exhaustive Judgment of Mr. Justice *Bhashyam Iyengar* leaves hardly any room for doubt that Acts imposing duties or taxes bind Government even in the absence of express mention of the liability of the Crown unless the very nature of the duty or tax is such as to be inapplicable to it. The only difficulty that we have felt is in the circumstance that there are English cases in which the prerogative of the Crown has been recognised, notwithstanding that in the particular enactments under which the cases arose there were special exemptions of the Crown in other parts of the enactments. See the cases cited at pages 490 to 492. But we think the trend of Indian Legislation has been as pointed out by Mr. Justice *Bhashyam Iyengar* in favour of the view that unless the Crown is exempted, the Crown is liable to taxes which are imposed in language wide enough to cover the Crown.

Rustom Jamshed Irani v Hartley Kennedy.—I. L. R., 26 B 396:—The tendency certainly is to enforce the construction of the languages of statutes according to the plain and ordinary meanings of the words used and to reject all technical and, if we may say so, all departmental constructions, unless there are strong reasons for doing so. Nobody perhaps has insisted upon the principle of natural interpretation more than the present Lord Chancellor, Lord *Halsbury*. In the case under notice, *Jenkins*, C. J., and *Crowe*, J., reversing *Russel*, J., held that there were no good grounds for holding that the word ‘shall’ in Ss. 11 and 12 of Bombay Act 48 of 1861 means anything different from ‘shall,’ and that accordingly the Commissioner of Police at Bombay had no discretion to refuse a license to keep an eating house, when asked for, on the ground that in his opinion no more eating houses were required in the locality in which the applicant intended to keep one.

Vithaldas Kanjishet v. Secretary of State for India.—I. L. R., 26 B. 410:—When a person attempts to escape by putting

his agent in the wrong, he cannot readily command the sympathy of others in doing so. That was what the Government attempted to do in this case. Government was paying rent through its customs officers for certain land which the plaintiff claimed as his own. But some shrewd clerk thought that his superior officers had not been shrewd enough and told them that the land belonged to the Government. This rebuke and advice were taken in good part and the Government refused to pay rent any longer. The plaintiff consequently sued to eject the Government. Government said the payment of rent was made by its customs officers under a mistake and really without its knowledge, though it is not always easy to see who the 'it' is. The Court, *Jenkins, C. J.*, and *Chandavarkar, J.*, held that the payment of rent raised a presumption that the land belonged to the plaintiff and remitted the case for a fresh finding on the question of title. It did not matter that Government had not authorised the payment of rent if such payment was within the scope of the agent's authority.

Damodar Venkatesh v. Bhavanishankar.—I. L. R., 26 B. 423:—The Bombay High Court had to deal in this case with the professional conduct of a pleader. He was charged with making improper use to the disadvantage of his client of information which he had obtained in professional confidence while acting for such client. The complaint was that the pleader used such information for cross-examining the client while the pleader was acting subsequently for his client's antagonist. The Court found that the pleader had proved that he had not used any confidential information received by him from his client against that client. We would draw attention to the advice given by the Court that a pleader should not confound what he is bound to abstain from for escaping punishment with what is wrong and should therefore be avoided. In its disciplinary jurisdiction the Court can exact only a certain standard of rectitude. But it does not follow that either the Court or the profession will approve of a pleader who is content to adopt no higher standard. We would go further and say that there are many acts which even the profession cannot condemn, but which a pleader as a man should avoid.

Bansidhar v. Gaya Prasad.—I. L. R., 24 A. 179:—There were two successive mortgages by conditional sale, two persons

being mortgagees in each case and one of them being mortgagee in both. There were two decrees for foreclosure on the footing of these mortgages. The puisne mortgagee as a defendant in the suit on the first mortgage paid off the mortgage amount after decree and applied for foreclosure. He was referred to a regular suit. *Stanley, C. J.*, and *Burkitt, J.*, hold that S. 244 bars the separate suit. There are two difficulties in the way of this conclusion. S. 74 of the Transfer of Property Act gives the puisne incumbrancer paying off the prior mortgage all the rights of the latter. But does this mean that the puisne incumbrancer by payment becomes the transferee of the decree. We do not see any authority for this. Again the executing court decided rightly or wrongly that the matter was one for a separate suit. Does not this decision bind the parties? The learned Judges say that this decision might have been corrected by appeal. But suppose that the appellate Court said the same thing. Its opinion has no increased binding force between the parties. If the order is binding, the party in whose favor it was passed, cannot, it seems to us, raise the objection in the suit that the matter is one for execution.¹

Lali v. Murlidhar.—I. L. R., 24 A. 195:—The much vexed question of the meaning of Articles 118 and 119 of the Limitation Act has again arisen in this case. Certain dicta of the Privy Council have been supposed by the Bombay and Madras High Courts to conclude the matter. The Calcutta and Allahabad High Courts seem to think otherwise. Recently in a most elaborate judgment (not yet reported) Mr. Justice *Bhashyam Iyengar* dissenting from the opinions of *Benson* and *Moore, JJ.*, has shown that the Privy Council has not made any definite pronouncement on the question and that the scheme of the Limitation Act including the special articles referred to is against their applicability to suits for possession of property though a question as to the *factum* or validity of an adoption may be incidentally involved in their determination.

Biri Singh v. Nawal Singh.—I. L. R., 24 A. 226:—We are glad to see the Allahabad Court taking the view that some of several persons entitled to a sum of money may sue the debtor making the others defendants and that it is not necessary

1. See *Narasimha Row v. Rama Row*, 5 M. L. J. 79.

for the maintainability of the suit that the plaintiffs should show that the obligees who have not joined as plaintiffs were asked to join and refused. The narrower view which was taken by the Calcutta High Court in *Dwarakanath Mitter v. Tara Prosunno Roy*, I. L. R., 17 C. 160 and accepted by the Madras High Court in *Parameswaran v. Shangaran*, I. L. R., 14 M. 489 has, we are glad to find, been given up in all the courts.

Saiyid Ali Khan v. Debi Prasad.—I. L. R., 24 A. 251 :—A suit by a pawnee to recover the balance after crediting the sale proceeds of the articles pawned personally from the debtor is governed by the three years' rule in Article 57. The right of action to recover the debt personally is not postponed till after the articles pledged are sold. It seems therefore difficult to hold that Article 120 must apply. The view of the learned Judges is in accord with that of the Bombay Court.

Periasami v. Krishnayyan, 25 M. 431 :—We are in complete accord with the decision of the Full Bench in this case. In 4 M. L. J. 50 we expressed our opinion that S. 7 of the Limitation Act applied only where all were under disability. S. 8 which applies to suits where some alone have been under disability does not apply to applications for execution notwithstanding the contrary view expressed by some of the other High Courts. We do not think there is much room for doubt upon both these points. The more difficult question as to the starting point under Article 179 has been dealt with by the Full Bench, and the conclusion arrived at that it is not open to the party seeking the benefit of S. 7, to select his own starting point, but that it should be the latest applicable to the case, of the various dates referred to in the clauses of Article 179 commends itself to us. The matter is discussed by Mr. Justice *Bhashyam Iyengar* with his usual fulness.

Ramasami Chetti v. Paraman Chetti.—I. L. R., 25 M. 448 :—We do not see how it was competent to a plaintiff to treat his suit both as one under the section of the Specific Relief Act and as one under the general law of Ejectment. In the first case the defendants' title is immaterial and in the second on proof of title by the defendant the plaintiff is out of Court. *Davies and Benson*, JJ., rightly declined to follow the Allahabad view.

SUMMARY OF RECENT CASES.

Torkington v. Magee [1902], 2 K. B. 427.

Judicature Act, 1873, S. 25, Sub-Sec. 6—'Debt or other legal chose of action'—Assignment of contract before breach—Contract to sell reversionary interest—Assignment—Assignee's right to sue for damages.

The words "A debt or other legal chose of action" in S. 25, sub-sec. 6 of the Judicature Act, 1873, mean "a debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable."

An executory contract of purchase under which each party had rights and liabilities, but of which there had been no breach at the date of the assignment, so that at that date no action could be brought upon the contract, but which, if occasion should ever arise to enforce it, must of necessity be enforced by action, is still a "legal chose in action" so as to be assignable under S. 25, sub-sec. 6 of the Judicature Act.

A court of equity will refuse to give effect to an assignment of a mere right to litigate and hence an assignment to a person, after contract, of the right to recover damages will not be enforced by such courts.

Where a person contracted to sell his reversionary interest to another who assigned it over to a third person who perfected his title by notice to the vendor but the latter, however, refused to perform his contract :—

Held in an action by the assignee for damages,

- (1) that the assignment was valid,
- (2) that the mere fact that the assignee sued for damages and not for specific performance did not make his original assignment invalid, and
- (3) that the assignee was entitled to recover damages.

In re Lawford and Lawrence—Ex parte The Trustee
[1902], 2 K. B. 445.

Bankruptcy—Pledge of cabs by person in difficulties—Act of bankruptcy—Pledgee's right to receive payment from person authorized by debtor before adjudication and to return cabs.

Where a person prior to his bankruptcy pledged his cabs to another who knew his pledgor was in difficulties but acted in good faith in advancing the loan and under the contract of pledge the pledgee was bound to return the cabs on payment and the pledgor was afterwards adjudicated a bankrupt and the act of bankruptcy being some time before the pledge. The trustee's title related back to the date of bankruptcy; and the pledgee was paid by a third person who had authority from the pledgor, and such third person received the cabs.

Held (1) that the pledgee was not liable for conversion to the trustee in bankruptcy though he may not be protected by S. 49 of the Bankruptcy Act and may have no lien on the cabs,

(2) that under the contract he was bound to return the cabs on payment and was only discharging his obligation under the contract in returning the cabs on payment to a person authorized though the latter was acting in concert with and on behalf of the bankrupt, and

(3) that the trustee not existing at the time of the return there was no wrong done by the pledgee in not giving them up to a non-existent person.

Hughes v. The Pump House Hotel Company, Limited, [1902],
2 K. B. 485.

Practice—Adding or substituting plaintiff—Order XVI, rr. 2, 11.

Where an action is commenced in the name of the wrong person as plaintiff through a *bona fide* mistake, the Court has jurisdiction under Order XVI, r. 2, to order the addition or substitution

of another person as plaintiff though the original plaintiff has no cause of action himself.

Thus where the Court of appeal held in [1902], 2 K. B. 190, that an assignment by the plaintiff was absolute and that, therefore, he had no right to maintain the action after such assignment and he applied for an order for the substitution of the assignee as plaintiff on the ground that the action was commenced by him *bona fide* :—

• *Held*, that the Court had jurisdiction under Order XVI, rule 2, to substitute the assignee as plaintiff.

[This rule is substantially the same as S. 27 of the Civil Procedure Code, only the words “with his or their consent” are not to be found in the English rule, but rule 11 of the same provides for this and this rule 2 is taken as subject to rule 11.]

Robinson Gold Mining Company v. Alliance Insurance Company [1902], 2 K. B. 489.

Insurance policy—Warranty—“Free from capture and seizure,” meaning of—Salus populi suprema lex—Possession of gold taken by Boer Government.

The words “warranted free from capture and seizure” in a policy of insurance mean that the insurers are not to be liable for the things to which the warranty applies.

“Capture” would seem properly to include every act of seizing or taking by an enemy or belligerent. But “seizure” is a larger term than “capture,” and embraces every act of taking forcible possession either by a lawful authority or by overpowering force. It includes a case of taking possession by the Government of private property for State purposes, being the exercise of an act of authority following on the calling out of the forces of the country and the suspension of the constitution on the general principle “*Salus populi suprema lex*.”

Where, therefore, a gold mining company registered under the laws of the South African Republic and owning property and

carrying on business there insured with the defendant company against "arrests, restraints, and detentions of all kinds, princes, and people" during transit from the mines in the South African Republic to the United Kingdom, but the policy contained a warranty by the plaintiffs against "capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war," and gold to the value of £221,950 to which the policy attached was despatched by the plaintiffs under guard of an armed escort by rail from Johannesburg to Cape Town *en route* to London, and the same was removed from the train and was taken in charge by the resident justice acting on behalf of the Executive Government of the Republic, and similarly other gold belonging to the plaintiffs to which the policy attached was seized by the authority of the Executive Government of the Republic when at a bank pending transit, but at the time of the seizure there was no delivery of an ultimatum by the Republic to the British Government, though the commandoes had been called out and the railway and the staff taken over by the Boer Government and no gold was ever returned to the plaintiffs :—

Held, in a suit by the plaintiffs upon the policy that the defendants were not liable under the warranty clause as there was a seizure within the meaning of the warranty.

Rex v. Archbishop of Canterbury [1902], 2 K. B. 503.

Mandamus—Crown—Jurisdiction to award costs.

In matters at common law "the Crown never paid nor received costs." This rule is even now in force.

The Court has no jurisdiction to award costs in favor of or against the Crown where it is a party to the argument of a rule for a prerogative writ of mandamus.

• *Quære* :—Whether the High Court of Justice is empowered to make rules binding on the Crown for enforcing payment of costs in all cases.

In the Goods of Kirby [1902], P. 188.

Will—Executors hereinafter named—Trustees—Executors according to tenor.

Where a testator directed the payment of his debts and funeral expenses by his "executors hereinafter named," but failed to appoint any, and he named in the will his widow and two sons as trustees, but there was no vesting of any trust in them and the trustees were given legacies for their services:—

Held that the word "trustees" was employed loosely and that the trustees were executors according to the tenor.

Aylwin v. Aylwin [1902], P. 203.

Probate Suit—Costs.

Where a principal beneficiary took instructions himself and caused a will to be prepared by a solicitor, who was, however, not allowed to see the testator, *held* that the circumstances were such as to invite inquiry and the Court would be justified in holding that there ought to be no order for costs against a defendant who challenged the genuineness of the will.

In the Goods of Peverett [1902], P. 205.

Informal document—No attestation clause—Witnesses dead—Presumption—"Omnia præsumentur rite esse acta."

The Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes.

The Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled.

The Court has presumed that the testamentary papers were properly executed although the attestation clauses were more or less imperfect. The Court will act on this presumption even in a case where there is no attestation clause if the circumstances warrant.

Where, therefore, an informal holograph document signed by the testatrix with signatures of two persons who were both dead but not stated to be as witnesses contained no attestation clause and did not show on its face that it was signed first by the testatrix and then by the two others and that all three were present at the same time while so signing, and there was no evidence to prove the handwriting of one of the signatories :—

Held, that the principle "*Omnia presumuntur rite esse acta*" applied and the Court might presume that the document was duly executed in accordance with the Statute of Wills.

The Oavingden Grange [1902], P. 208.

Burden of proof—Contributory negligence—Collision.

There is no question of burden of proof where all the facts are proved and the question is what is the weight to be given to the evidence. The stage of burden of proof is past when the Court has all the evidence and has to deal with the facts proved.

Where two vessels were both in the wrong and there was a collision, and the collision would not have happened but for the negligence of one of them in the first instance, the latter would not be entitled to insist that the other vessel was bound to use more than ordinary care to avoid the collision by reason of the first vessel being in the wrong at the first instance.

Wigley v. The Solicitor to the Treasury [1902], P. 233.

Administration suit—Statement in Scottish Marriage register—Marriage of parents—Evidence.

A statement in the extract of a Scottish Marriage Register containing the names of the parents of an intestate and made by his brother is *prima facie* evidence of the marriage of the parents in an administration suit (in which one of the next of kin claims grant of letters of administration).

Brisco v. Baillie Hamilton [1902], P. 234.

Will—Draft sent to the testator—Some alterations by testator—Will brought to the notice and mind of the testator—Question of fact.

If it can be proved that a will has been really brought to the mind of a testator and has been duly executed, it is difficult in law to hold that anything contained in the will is a mistake.

The question whether the will was or was not really brought to the notice of the testator is still a question of fact depending upon the particular circumstances of the case.

Fulton v. Andrew (1875), L. R. 7 H. L. 448, referred to.

Where, therefore, a solicitor mistook the extent of the interest of the testatrix in certain real estates and a draft of the will containing a devise of these estates upon this mistaken notion was sent to the testatrix for her approval and she returned the draft with certain alterations in other parts, but there was no evidence that the whole draft was read over to her, or that the particular portion as to the devise of the real estate was brought to her notice and approved of by her:—

Held that the restrictive words as regards the interest of the testatrix must be struck out and probate granted as if the devise of the real estate was of the whole interest of the testatrix.

In the Goods of Smart [1902], P. 238.

Testaments—Informal document—Incorporation—Reference in formal document of informal document as existing—Reference to future document.

If a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of the will and is incorporated into it.

It is essential, however, in order that an informal document should be incorporated in the validly executed document, that the latter must refer to the former as a written instrument then existing (*i. e.* at the time of execution) in such terms that it may be ascertained.

If the informal document is not existing at the time of the will, but comes into existence afterwards and then there is a codicil confirming the will, the same principle ought to be applied. The will being treated, by the confirmation given by the codicil, as executed again and as speaking from the date of the codicil there will be incorporation of the informal document if the latter is existing then and is referred to in the will as existing so as to identify it. But if the will, treated as being re-executed at the date of the codicil, still speaks in terms which shew that it is referring to a future document, then there is no incorporation.

Where, therefore, a testatrix made a will which contained a statement that the trustees should give to such persons such things as she might designate in a book, and no book was existing at the date of such will but a book came into existence afterwards and a codicil was made by the testatrix subsequently to such book but the codicil made no mention of the book but only confirmed the will:—

Held that the book was not incorporated with the will and that probate can be granted only of the will and codicil.

Leonard v. Leonard [1902], P. 243.

Will—Several sheets—Destruction of some—Effect—Substitution—Intention—Intestacy.

Where a will contains five sheets and two of the sheets are destroyed by the testator and the three other sheets are unintelligible and unworkable by themselves, the destruction of the two sheets has the effect of destroying the validity of the whole will.

His intention must certainly be taken to be to revoke the remaining portions if he did not intend the latter to be his operative will without doing something more (as by putting two other sheets on to them).

Where two sheets are newly executed by the testator and added to the old remaining three sheets, the intention to be inferred is that those two sheets should not by themselves be

operative as a will. The testator's intention is that they should be operative and valid if the will is valid at the end. When the latter sheets had no effect by themselves they would not make the substituted sheets operative.

Where, therefore, a testator wrote a will containing five sheets and subsequently destroyed the first two sheets, and afterwards substituted two sheets in their place and signed and caused the witnesses to sign those two sheets and also signed and attested against the last sheet.

Held :—(1) that the testator signed and caused the witnesses to sign the two sheets simply to shew that they formed part of a will to which the signature at the end of the will was to give validity,

(2) that the destruction of the two original sheets destroyed the whole will (including the three other sheets),

(3) that the three remaining old sheets having no validity in themselves could give no validity to the two sheets newly substituted, and

(4) that it must be taken that there was an intestacy and that no part of the five sheets nor all the five sheets could be admitted to probate.

In re Holland—Glegg v. Holland [1902], 2 Ch. 360.

13 *Eliz. C. 5—Statute of Frauds* (29 Car. 2 C. 3) Ss. 4 and 17—*Post-nuptial settlement—Property jure mariti—Husband's beneficial interest divested by bankruptcy—Fraudulent conveyance—Specific performance.*

A post-nuptial settlement made by the husband of property to which he was entitled *jure mariti*, containing a clause to the effect that his beneficial interest should continue only until he should become a bankrupt, or assign or attempt or affect to assign, is not by reason of the clause *ipso facto* fraudulent within the statute of Elizabeth.

A post-nuptial settlement by a husband of property coming to him in right of his wife is *prima facie* good, where there is no proof of his being indebted at the time and is made upon such consideration as would prevail against creditors.

A proviso in such settlement authorising the trustee of the settlement to lend a part or the whole to the husband, divesting the beneficial interest of the husband in such settlement upon bankruptcy or assignment, does not render the settlement fraudulent.

In re Pearson 3 Ch. D. 807 overruled.

Where the trustee in bankruptcy claims to treat a deed by a person before bankruptcy as void under the statute of Elizabeth, he is asserting a right which the bankrupt could never have set up, and, therefore, the recitals in such deed are not admissible against him. But where the trustee resists specific performance of the covenants contained in the deed on the ground that it is voluntary, he is setting up a defence available to the bankrupt himself and is, therefore, identified in interest with such bankrupt and, therefore, the recitals in such deed that it was made in consideration of marriage and in pursuance of an ante nuptial agreement are admissible as against such trustee in bankruptcy.

The true construction of the Statute of Frauds, Ss. 4 and 17, is not to render the contracts falling under them void, still less illegal; but is to render the kind of evidence required indispensable when it is sought to enforce the contract. The note or memorandum referred to in these sections need not be contemporaneous with the contract. It is enough if it comes into existence before the commencement of the action to enforce the contract.

A post-nuptial settlement made in consideration of marriage and in pursuance of a prior ante-nuptial agreement is not a mere voluntary settlement and specific performance of such settlement can be enforced against the settlor and his trustee in bankruptcy.

Where, therefore, a post-nuptial settlement made in consideration of marriage and in pursuance of a prior ante-nuptial agreement (both of which were recited in the deed) was made by the

husband with respect to reversionary property coming to him in right of his wife, whereby it was provided that the income of the property when it should fall into possession should go to the wife for life for her separate use, and upon her death to the husband for life or until he shall be outlawed or have become bankrupt, &c., and in failure or determination of the trust created in favor of the husband, the capital should go to the children, &c., and the husband was not at the time unable to pay his creditors or contemplating, entering upon or continuing in a business of such a speculative nature as to be likely to land him in financial embarrassment :—

Held :—(1) That the settlement was not fraudulent within the meaning of the statute of Elizabeth (13 Eliz. C. 5).

(2) That the recital in the deed of the consideration and of the post-nuptial agreement was sufficient to satisfy the Statute of Frauds.

(3) That the settlement was not voluntary and was capable of being specifically enforced.

In re Andrews—Andrews v. Andrews [1902], 2 Ch. 394.

Donatio mortis causa—Post Office Savings Bank Book—Government Stock Investment Certificate.

Where a deposit is invested by the Post Office Savings Bank for the depositor in Government Stock, and the Bank under regulations contained in the deposit-book places the stock on the Savings Bank Investment account of the National Debt Commissioners and credits the same to the depositor, mere delivery of the investment certificate and the deposit-book, unlike that of a Post Office Savings Bank deposit-book, will not constitute a good *donatio mortis causa* of the Government stock.

Jared v. Clements [1902], 2 Ch. 399.

Equitable mortgage—Solicitor in possession—Purchaser from mortgagor—Notice—Forged receipt by solicitor.

A purchased a certain leasehold. To meet a portion of the purchase-money A applied to his solicitor to find funds. B, also

a client of A's solicitor, advanced this sum and got from A the title-deeds by way of equitable mortgage. The title-deeds were kept with the solicitor. A wanted to sell and the defendants agreed to buy. Their solicitors came to know of this equitable mortgage and insisted upon the discharge of this. A's solicitor stated that he would get the handing over of the memorandum of deposit with a receipt endorsed thereupon by the equitable mortgagee. Upon the defendants' solicitors consenting, he forged the signature of the equitable mortgagee and handed over the memorandum of deposit with the receipt endorsed thereupon together with the title-deeds and the purchase was completed. B, the equitable mortgagee, sued the defendants for enforcement of his lien or charge.

Held, that he was entitled to enforce his charge, that the defendants having had notice of the charge could not claim any priority, and that the forged receipt did not bind B the plaintiff.

British Homes Assurance Corporation, Limited v. Paterson,
[1902], 2 Ch. 409.

Partners—Contract with one—Election—Liability of others.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership.

All partners are liable by the act of one partner as the latter acts or contracts as agent for them as either disclosed or undisclosed principals.

If the principals are disclosed, then the act is avowedly with them or on their behalf and so all are liable.

If the principals are undisclosed, then also they are liable as the law gives the other contracting party the option of proceeding against the undisclosed principal when discovered.

But where one person knowing two others to be partners, refuses to contract with them jointly and insists on contracting with one of them or elects to treat the contract as having been made with one, he cannot afterwards treat the other as liable.

In re London and Globe Finance Corporation, [1902], 2 Ch. 416.

Brokers—Specific advance—Discharge—Securities still in possession—Balance—General lien.

Brokers have a general lien for the amount due to them by their customers on all securities which may come into their hands in the course of their business as brokers of the customers.

Where, therefore, securities of a customer came into the hands of a broker to secure certain specific advance and remained with the broker even after such advance was satisfied and while still in possession a balance again became due to the broker by the customer, the general lien attached for such balance unless there was an intention to exclude the general lien.

Bradshaw v. Widdrington [1902], 2 Ch. 430.

Real Property Limitation Act, 1874 (37 and 38, Vict. C. 57) S. 38—*Mortgage—Acknowledgment—Payment of interest—Person bound to pay—Books of account—Entries—Evidence.*

The whole basis and principle of all the Statutes of Limitation is that a payment, to take a case out of the statutes, must be a payment by a person liable as an acknowledgment of right, and that such payment is an admission of the right of the person to whom it is paid.

In order that a payment of interest may be a payment within the meaning of S. 8 of the Real Property Limitation Act, 1874 (37 and 38, Vict. C. 57), it is sufficient if the payment be made by a person who, as between himself and the mortgagor, is bound to pay—though not bound as between himself and the mortgagee.

Where the payment is made by a person under an obligation imposed upon him by law as a legal agent of the mortgagor without his assent or under an arrangement with the mortgagor (when the payment is with the express or implied assent of the mortgagor), there is in point of law an admission by the mortgagor of the subsistence of the security.

Entries in books of account though admissible in evidence must, like any other evidence, be taken for what they are worth. They do not become absolutely unimpeachable because they are admitted in evidence.

Where, therefore, a solicitor who acted for the mortgagor and the mortgagees, and after the mortgagor's death for his executors paid the interest upon a mortgage regularly :

Held that this was a payment within the meaning of S. 8 of the Real Property Limitation Act, 1874, and that the mortgage debt had not become barred.

Cackett v. Keswick [1902], 2 Ch. 456.

Companies Act 1867 (30 and 31, Vict. C. 131) S. 38—Fraudulent—Contract material—Benefit of S. 38 waived by contract—Waiver Clause—Notice of what is to be waived—"Honest and not misleading."

To herd together under a collective word like "fraudulent" people who are honest and people who are dishonest cannot tend to the maintenance of commercial morality. That is the effect of S. 38, Companies Act, 1867 (30 and 31, Vict. C. 131) which provides that a man who omits to mention in a prospectus a contract which it would be material to an intending investor to know shall, though acting honestly, be deemed fraudulent.

Though S. 38 is general in its terms, yet it must be taken with the limitation that it applies only to a contract which it will be material for an would-be investor to know before he made his investment.

S. 38 does not belong to the class of cases in which the law says that you cannot contract yourself out of the benefit of the statute.

So a waiver clause (*i. e.*, when a person waives the benefit of S. 38) may be enforced if it is honestly made and is not misleading. Where, therefore, the prospectus of a Mining Company disclosed certain agreements and stated that there might be others not men-

tioned which might fall under S. 38, and the plaintiff signed an application, and the particulars of a contract whereby a firm was to receive certain shares, part of which was to be commission for underwriting and the rest bonus for the use of the firm's name in floating the company, were not given in the prospectus:—

Held:—that the contract was one which ought to be mentioned under S. 38, and that as there was a failure to give the would-be investors sufficient notice as to the nature of what is to be waived, it was not covered by the waiver clause.

[S. 38 is similar to S. 88 of the Indian Companies Act, VI of 1882, except that the limitation contained in the words “and which might reasonably influence a person in determining whether he would or would not become a shareholder in the Company” found in S. 88 of the Indian enactment is not to be found in the English enactment. The limitation is however imported as a matter of construction by *Thesiger, L. J. in Sullivan v. Metcalfe*, 5 C. P. D. 455:—*Ed.*]

Jarrah Timber and Wood Paving Corporation, Limited,
v. Samuel [1902], 2 Ch. 479.

Mortgage—Clog on equity of redemption—Option to purchase mortgaged stock.

A mortgage must not be converted into something else. If a stipulation is for the benefit of the mortgagee and is part of the mortgage transaction, it is but part of his security and necessarily comes to an end on the payment off of the loan.

Dictum of Lord *Davey* in *Noakes & Co. v. Rice* (1902), A. C. 24 approved.

Where a loan was made on the terms that the borrowers should secure repayment of the loan with interest by the transfer of debenture stock, and that the lender should have the option of purchasing the whole or any part of the stock at 40 per cent. within 12 months and that the loan was to become repayable on 30 days' notice,

Held, that the option to purchase was a clog or fetter on the right of redemption and was accordingly void and unenforceable.

In re Cartal (New) Mines, Limited, [1902], 2 Ch. 498.

Companies Act, 1862 (25 and 26 Vict. C. 89) 551—*Winding up—Special resolution—Declaration of Chairman—Conclusive.*

If the Chairman by his declaration affirms erroneously or without sufficiently ascertaining the facts but *bona fide* that a resolution has been carried, the Court cannot go behind that declaration. But where a Chairman by his declaration finds the figures and erroneously *in point of law* holds that the resolution has been duly passed, such declaration is not conclusive.

Where, therefore, the declaration shows on the face of it that the statutory majority has not voted in favor of a special resolution for a voluntary winding up, it is not conclusive under S. 51 of the *Companies Act*, 1862.

[S. 51 of the English *Companies Act*, 1862, is similar to S. 77 of Indian *Companies Act*, VI of 1862 :—*Ed.*]

JOTTINGS AND CUTTINGS.

The Police Commission.—There are two points to which we would like the attention of the Police Commission should be drawn. There are numbers of cases in which accused persons who have made confessions are acquitted by Sessions Courts, they coming to the conclusion that the confessions were not voluntary. The obvious inference in such cases is that the Police were responsible for such false confessions. One would like to have a return showing the number of such cases in each year for the last ten years, also what action was taken against the Police officers concerned in obtaining such confessions by the heads of the Police. There is often a disposition in certain heads of departments to cover the backslidings of their subordinates in their zeal for the *esprit de corps* of their service which too often blinds them to defects which outsiders have no difficulty in observing. Such a return ought, we think, to be highly useful to the commission in their laudable efforts to improve the Police service.

The other point we refer to, is in connection with the registration of crimes. It is within our own experience and, we need hardly add, within the experience of almost every one that has had anything to do with the working of the Police, that numbers of crimes reported to the Police are never entered in the register. The obvious reason is that the entry of all crimes reported will greatly reduce the proportion of detections for which the Police claim credit. The Commission ought to elicit evidence as to whether the registers in any province kept by the Station House Officers are believed to be a correct record of the occurrences reported to them.

Some Essentials to the Young Lawyers' success:—“In preparing this article I want the reader to understand that the student to whom it is addressed is the average young man, unaided by any rich heritage or other special prestige, but a clean young man with an average amount of learning and a fair knowledge of the ups and downs of life, and modest means to begin with. This is the kind of young man who needs help and advice; the other kind does not, or if he does, it may be doubted whether the advice would be followed.

After an office has been set up, the next thing is to get business. The first cases come hardest. At this stage it is especially true that ‘nothing succeeds like success.’ Therefore a young man cannot afford to lose often at this time. Many young lawyers, in their eagerness for business, advise litigation where the chances for success are anything but favourable. Many times friends of young attorneys, who have for some years had bad claims assigned to the pigeon-holes of some older lawyer, withdraw them (to his delight) and give them to their young friend to tussle with while in waiting for something to do. When any of your friends speak to you of such claims, do not brag too much as to what you will do with them, for, generally, if the older lawyer could not handle such claims while they were fresh, there is less possibility for your doing so when they are old and stale.

There are some men who enter the profession of law with a view to making it an avenue that will lead to political fame or some other desired position. These men may make orators, but they seldom make lawyers. Any man who makes law a side issue

will be a failure as a lawyer, and the sooner he quits the profession the better. But as these men constitute no part of the class we address, we will dismiss them at once.

I think that every young lawyer has, or at least ought to have, the ambition to rise during the first ten years of his profession to that plane where he can have a goodly portion of the practice and command the respect of both Bench and Bar, and of the community in which he resides. In order to accomplish this, I would commend that, above all, he be honest to himself and client. As Lord Bacon has said: 'No pleasure is comparable to standing upon the vantage ground of truth.' When a case is submitted to you for consideration, look at it as though it were your own, and view it in a way to the best interest of your client. Do not jump into a lawsuit just because you see a fighting chance; study it from the opposite side before you commence proceedings. Tell your client what, in your opinion, he can do legally and what you think is most prudent under all the circumstances, then let him act accordingly. In case there is no alternative, and you must fight, no matter if there be only a fighting chance, inform your client fully of the situation, so that, in case you fail, he will not be very much surprised, and will be 'let down' as easily as possible, and in case you win he will be the more ready to appreciate what you have done.

Never try experiments at your client's expense without his express knowledge and consent. Charge reasonable fees for your services. Never say that you will charge half-price this time, hoping that he will call again. It will make him think he has a cheap lawyer who has but little to do. A beginner should not command as good pay for his service as one who has grown famous in the service; but as a rule too many young men make a mistake by doing business almost for nothing in order to get practice. Remember, honest people are willing to give a fair compensation for honest labour, and it is an honest respectable clientage that you are after.

Again, have your office, your papers and yourself tidy and neat, not dudish, but duly respectful. When a lady client calls to see you, do not sit talking to her smoking a cigar; she is observing, and will know just what you and your office looked like

when she goes away. She will remember ten times more of what she saw than a man, and is likely to tell twenty times as much. Never get the idea that in order to succeed you must be a sort of burly ruffian. What we call 'bulldozing' may bring applause at times, and may bring a victory, and there are people who desire this kind of a lawyer, but such people do not support many lawyers, and the day for this kind of proceedings is fast fading away beyond the horizon of civilization. The bulldozer and the pettifogger are deformities, and not true types of the profession.

Next, you must have system and dispatch; the lawyer of to-day must not only be a lawyer, but a business man as well. The people whose acquaintance you want to cultivate, whose business you desire, appreciate system and promptness. Yet, I must say many members of the Bar are very lax in this direction, especially in the smaller places where they have little to do. It seems that the less a man has to do, the less inclination he has for doing. Nothing disgusts me so much as when I have to send a claim to a foreign town for collection, and I must write two or three letters in order to wake the fellow up to make a report.

Go to some of the big collection houses in the large cities, ask what is their principal difficulty in obtaining competent attorneys over the country. They will tell you it is to obtain lawyers who act promptly and answer letters. Some attorneys upon receiving a collection will send the debtor a letter, pigeon-hole the claim, and wake up again about ten days afterwards when they receive a card asking them to please report; then stir around a little, and, in the course of a few weeks, write the agency a letter stating that they saw Mr. Smith and that he will pay as soon as he gets his crop off; referring to no number, no title, just 'Smith'. Upon receiving this letter, the agency will lose no time in making up its mind that you are not the man to do their business, and the next time they have a claim in your locality they will make it convenient to employ some one else.

Many attorneys have a faculty for giving proper attention to large and paying business, but act very negligently with small matters. This is a mistake. An attorney who does not intend to take proper care of small business should not accept it. A small case is just as much entitled to proper treatment as a large one. If

a man gives you a small collection, and you give it prompt and proper attention, he is likely to give you more business thereafter; but pay little attention to his small matters and he will, in all probability, not run the risk of entrusting his important business in your hands. Many of our successful lawyers, especially commercial lawyers, are not exceptionally brilliant, but they are wide awake persistent and prompt in their business and herein lies the secret of their success.—*Law Notes*.

* *

Right of selection as to place of burial :—The question who has the better right to select the place of burial of a deceased person as between the wife and children and the brothers and sisters was, says the *American Lawyer*, considered by the Court of Appeals of Kentucky in the case of *Neighbors v. Neighbors*, 65 S. W. 607. The Court holds that the current of authority is to the effect that there is not a property right to a dead body in a commercial sense, but that there is a right to bury it which the Court will recognise and protect. This includes the right to select a place of burial and to change at pleasure, and in the absence of testamentary disposition of the body, this right belongs to the next of kin. At the conclusion of the opinion the Court cites many interesting authorities. In addition, it called attention to the case of *Enos v. Snyder*, 63 Pac. 110 where the Court held that a man has no property in his body for the purpose of disposing of it by will, and that the custody of a corpse belongs to the next of kin as against the executor.—*Law Notes*.

CONTEMPORARY LEGAL LITERATURE.

- In the "Editorial Retrospect" given in the *Canada Law Journal* for October, there is an interesting review of the editorial history of this useful journal. It will be seen that the journal was started in 1855 and has thus run through 47 years of useful life. In an article on "Estates Tail" in the same journal for December the writer advocates the repealing of the statute *De Donis* (page 426).

In an article on "The Right of Privacy" in the *Columbia Law Review* for November, page 437, we find Mr. Denis O'Brien, a judge of the New York Court of Appeals—a very unusual spectacle

in India at any rate—defending the decision of that court on this question which is now apparently the burning theme of the day in America. In an article on “What is the Law Merchant,” *Columbia Law Review* for November, p. 470, the writer, Mr. Francis M. Burdick, tries to shew that the law merchant had a distinct origin from the common law. “The Sources of International Law,” by Sir Frederick Pollock, is very interesting reading and is a reprint of the article in the *Law Quarterly Review*.

• “The Evolution of the Judicial Opinion” p. 386 of the *American Lawyer* for September, by Mr. McClain treats of the English system of deciding cases by giving reasons for the decision and compares the English system of common law and the Roman system of law. This article also appears in the *American Law Review* for November—December (p. 801).

An article on “Conflicting decisions of Federal and State Courts” appears at p. 441 of the *American Lawyer* for October and this is concluded in November Number p. 491.

There is a learned article on “Legitimacy and Marriage” at p. 22 of the November part of the *Harvard Law Review* (Vol. XVI), in which a comparison is made between the English and Canon law, and the writer points out that wherever the Canon law seemed to be acceptable, it has been given effect to by legislation in the states. A problem in “Mining law” is an useful article in the *Harvard Law Review* for December (page 94).

There is an article on “The Origin of Magna Charta” at page 293 of the ‘*Law Students Helper*’ for December.

In the *Canadian Law Times* for October, p. 343, there is an article “Our Sovereign—The People !” in which the writer Charles Morse tries to show that the once prevailing maxim of “*Rex non potest peccare*” (The King is above law) must now be treated as exploded and assigned to the “limbo of discarded constitutional fallacies.”

An article on “Wagering Contracts” containing the Common Law and the Statute law on the subject appears at page 377 of the November part of the *Canada Law Times*.

In the *American Law Review* for September-October there is an article on “Crimes and Criminals.” The pith of the article

is that in the opinion of the writer the modern system of punishments is based on antiquated and discredited notions that have come down to the civilized world from a theological past and that any system of legislation must have in view the maxim that prevention of crime is better than punishment. Many of his suggestions (as example that the previous antecedents and previous life of an accused under trial for an alleged crime, should be gone into) are very difficult to be adopted in practice and one is reminded of the observations of *Rolfe, B.* in *Attorney-General v. Hitchcock*, 7 Exch. 91, as to the limits of the admissibility of evidence with respect to the matter in controversy:—"Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into; and enquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present." Of course the hands of courts and of lawyers will be too full of work, and there may be ample scope for the ever-increasing lawyer.

There is an interesting sketch of *Oliver Wendell Holmes*, the famous writer of the book on "Common Law" and now Judge of the Supreme Court of the United States (*American Law Review* for September-October p. 710). In the same number is an address before the annual meeting of the American Bar Association on "The Codification of Mercantile Law" by M. D. Chalmers, the author of the book on "Negotiable Instruments."

"Chinese Conveyancing" is an article which is well worth perusal by those who are interested in the comparative study of Law and appears in the above review for November-December (p. 825). The article on "Subscriber to Stock, Fraud" at (p. 855), considers the right of subscriber to stock of a corporation not formed to rescind this subscription on the ground of fraud of promoters. The subject is considered independent of statute (Companies Acts). There is an interesting and learned criticism at (p. 875) by Ewart, the American text-writer on the law of Estoppel, on the recent decision of the House of Lords in *George Whitechurch Limited v. Cavanagh* [1902], A. C. 117.

REVIEWS.

Indian Contract Act, by MOHAN LAL KOSLA, B.A., LL.B., and MOHANLAL PUBSHOTAM *Pleaders. The Punjab Law Book Depôt, Lahore. First Edn., 1901. Price Rs. 6-8-0.*

We owe an apology to the joint authors of this book for our delay in noticing it. The authors are entitled to the credit of having collected the cases in all the Indian Reports, official and non-official, and made their references available to the public. We have now an unofficial report in every province and the book bears testimony to the usefulness of these publications.

A Popular Guide to Civil Courts, by SYED RUSTOM ALI, 2nd Clerk and Accountant, Resident's Court Aden.

We have no belief in popular guides in the field of law. The author appears to have forgotten the old adage that he that is his own lawyer has a fool for his client. We would strongly recommend the layman not to purchase the book or to be guided by the guide. The best advice to the layman is what an American doctor once gave to a friend who approached him for his opinion in the course of a casual conversation "Take advice."

Law of Landlord and Tenant and of Hotel-keeper and Guest by BENI PERSHAD, B. A., and published by the Punjab Publishing and Stationery Company, (Limited), Lahore.

This appears to be a useful book. It contains a compendious statement of the Law relating to Landlord and Tenant. One important feature of the book is a reference to cases decided by the Punjab Chief Court which are generally inaccessible to practitioners of other provinces. Having regard to its scope, the book contains no discussion of principle. The author has appended an abstract of the law relating to inn-keepers. We venture to doubt whether the English common law with reference to inns has any application to this country; and we know of no Indian case in which the relations of innkeeper and guest were dealt with on the same footing here as in England, except *Whatsley v. Palanji*

Pestonji, 3 B. H. C. R., at 137 which was a case in a Presidency town. The author might have made his additions after the book had first left his hands, separately at the end of the book, instead of making it unsightly by introducing slips between, here and there.

Principles of Circumstantial Evidence, by WILLIAM WILLS. 1902. Published by Butterworth & Co. Price Rs. 12-8-0.

Wills's Circumstantial Evidence is a standard work on the law of Evidence. This new edition by his son Mr. Justice Wills is a welcome addition to the lawyer's library and a guide to the student of the principles of Evidence. The Editor has added greatly to the value of the book by references to recent cases illustrating the principles discussed. We would recommend the study of the book to all judges and practitioners in the land who have to deal with evidence.

Banker's Advances on Mercantile Securities, by BUTTERWORTH, 1902. Published by Sweet and Maxwell (Limited) 3 Chancery Lane W. C., London.

This is a new book and deals with a department of law with which the Indian Reader is altogether unfamiliar. The mercantile profession in England has increased the variety of mercantile securities and the principles of law governing the relations between the holders of such securities and those dealing with them have received large development in recent years. We have no doubt the book will be of immense use to merchants as well as lawyers.

Transfer of Property Act, Case Noted, by Robert G.M. MITCHELL, Bar-at-law, Published by Weekly Notes Printing Works, 3 Hastings street, Calcutta, Price Rs. 5.

We confess to a partiality for these case-noted Acts. Their pretensions are humble. They do not go in for so-called commentaries or annotations which generally consist in the quotation of

sections and the printing in large type of the head-notes of cases. These publications, on the other hand, tell you exactly the fare they provide, and the promise is strictly carried out. The next best thing to a commentary like Mr. Mayne's on the Indian Penal Code is a humble and accurate citation of the decided cases under the appropriate sections. The book is well got up and necessarily cheaper than more pretentious volumes which give the purchaser nothing better. The author should have noted the cases decided before the Act.

Elements of the Law of contract :—By A. T. CARTER, 1902. Published by Sweet and Maxwell (Limited), 3 Chancery Lane W. C. London. Price 7s. 6d. We have glanced through portions of this small volume and feel we can confidently recommend it to beginners. The propositions are most lucidly stated and the illustrations taken from decided cases explain the principles laid down. The volume is very neatly got up and will, we trust, command a large sale in India.

A compendium of the Law of Torts. By HUGH FRASER :—5th Edn., 1902. Published by Sweet and Maxwell (Limited), 3 Chancery Lane W. C., London. Price 8 sh. Dr. Fraser is well known to students of Law in India. The 5th Edition of his compendium of the law of Torts will, we trust, be in great request among law students. Dr. Underhill's book is more comprehensive. Having regard to its small compass, the book necessarily avoids discussions. But it contains a clear and accurate statement of the fundamental principles of the Law of Torts with a fair citation of illustrative cases.

We beg to acknowledge receipt of the following publications :—

Canadian Law Times	for ...	... November & December.
The Bombay Law Reporter	„ ...	... December.
The Law Students' Journal	„ ...	... Do.
Law Students' Helper	„ ...	... Do.
Law Notes	„ . .	... Do.
American Lawyer	„ ...	... October & November.
The Calcutta Weekly Notes	„ ...	... December.
The Punjab Law Reporter	„ ...	... Do.
The Lawyer	„ ...	... Do.
Case and Comment	„ ...	... October.
American Law Review	„ ...	... November & December.
The Indian Review	„ ...	... December.
Harvard Law Review	„ .	... November & December.
Canada Law Journal	„ ..	... October & November.
Kathiawar Law Reports	„ .	... December.
Columbia Law Review	„	... November & December.
Law of Confession—by S. Roy. Bar Library Calcutta. Price one Rupee.		

NOTES OF RECENT CASES.

Benson
and *Moore* JJ.
1902, Feb. 20.

} C. M. S. A. No. 47 of 1901.

Limitation Act, Art. 179—Previous application—Person entitled at the time—Proper application—Starting point.

Where under a decree afterwards reversed on appeal the plaintiff became entitled to execute a decree in another suit passed in favour of the defendant, any application for execution put in by him during the pendency of the appeal is one put in by a proper person in accordance with law and will enure for the benefit of the decree-holder.

In a partition suit the plaintiff got for his share a decree passed in favour of his brother. He put in an application for execution, but it was dismissed for the non-production of the partition decree. On appeal by the defendant in the partition suit, it was decided that he was exclusively entitled to the decree. Now he applied to execute the decree more than 3 years after the date on which it was passed, but less than 3 years after the date of the application by his brother, the plaintiff:

Held, that it was not barred as it was made within 3 years of the previous application.

T. V. Seshagiri Aiyar and V. Ramesam for appellant.

A. S. Balasubramania Aiyar (for *P. R. Sundara Aiyar*) for respondent.

Bhashyam Aiyangar
and *Moore* JJ.
1902, Feb. 21.

} S. A. No. 961 of 1900.

Civil Procedure Code, S. 43—Hindu widow—Two alienations—Different alienees—Reversioner's suits to recover—Causes of action—Defendants—Same matter.

A Hindu widow alienated lands inherited by her from her husband by two sale deeds executed to two different persons

After her death, the reversioners brought two different suits against the two alienees to recover possession of the respective properties sold to them. The question was whether S. 43, C. P. C., was a bar to the second suit. It was *held* that the defendants being different, the causes of action were different and that therefore S. 45 was no bar to the suit. It may be that though the causes of action are different, yet if the claim is in respect of the same matter, a single suit is maintainable against defendants against whom relief is claimed severally. Though such a suit if properly framed is maintainable under S. 28, C. P. C., such joinder is not obligatory, and S. 43 has no application to such cases.

V. C. Seshachariar for appellant.

K. Ramachandraiyyar (with *P. R. Sundara Aiyar* and *E. Venkatarama Sarma*) for respondent.

Bhashyam Aiyangar

and *Davies JJ.*

1902, Feb. 21.

S. A. No. 1260 of 1900.

Civil Procedure Code S. 368—Death of defendant—Adjournment—Dismissal on adjourned day for default of plaintiff.

Where a defendant died and the fact was brought to the notice of the Court, the Court cannot adjourn the trial to a particular day. The trial of the suit must be suspended till the plaintiff brings the representative on record—which he may do within 6 months—or the representative of the deceased defendant of his own accord comes and joins the suit.

In this case the 3rd defendant having died, the trial was adjourned to a particular day. On that day the representative of the 3rd defendant had not been brought in, but the District Munsif dismissed the suit on the ground that the plaintiff did not appear on that day. An application for restoration was also dismissed. An appeal to the District Court having failed, this second appeal was preferred.

Their Lordships *held* that the adjournment to a specified day was bad and consequently also the order dismissing the suit for non-appearance of the plaintiff. The suit was directed to be

restored to file and regularly disposed of by the District Munsif under S. 368, C. P. C.

A. S. Balasubramania Aiyar (for *P. R. Sundara Aiyar*) for appellant.

C. V. Krishnasami Aiyar (for *V. Krishnasami Aiyar*) for respondent.

Bhashyam Aiyangar

and *Moore, JJ.*

1902, March 3.

S. A. 1152 of 1900.

Arbitration—Award—Finality—Agreement to be bound by the decision of the court as the final decision of the case.

In the suit from which this appeal arose, after the framing of the issues, the following petition was filed in court by both the parties as under S. 394, C. P. C.: "Both parties will abide by the decision of the court that may be passed as it thinks just after perusing the documents filed by both the parties and all the records in the said suit and after measuring the sites and inspecting the marks, etc., thereon. Therefore both parties will abide by the decision of the court as the final decision."

The District Munsif finally passed judgment for the plaintiff. On appeal the Subordinate Judge overruled the objection that no appeal lay, holding that the petition only dispensed with oral evidence in the case, and reversed the judgment on the merits. On second appeal, held that the court was chosen arbitrator and that the decree of the court was not appealable. It was further remarked that if the decision of the District Munsif had been objected to on any of the grounds mentioned in section 520 or 521, then it might be necessary to transfer the case to another court for inquiry but as no such objections had been raised in the grounds of appeal to the lower court, the District Munsif's decision was restored as final.

T. V. Seshagiri Aiyar for appellant.

T. R. Venkatarama Sastri (for *P. S. Sivaswami Aiyar*) for respondent.

Bhashyam Aiyangar }

and *Moore, JJ.* }

1902, March 3. }

S. A. 1159 of 1900.

Limitation Act. Ss. 19 and 20—Part-payment under the handwriting of debtor—Debt.

The plaintiff and the defendant were both joint decree-holders in a prior suit. The decree amount, however, really belonged to the defendant. The money was realised by the plaintiff and taken by him as part-payment of a debt owed to him by the defendant. In the vakalat given by them to the Vakil to enter satisfaction of the decree and in the vakil's petition to the Court it was recited that the plaintiff had collected the money and credited it in the defendant's account. The question was whether this would save limitation as acknowledgment or part-payment of debt in the debtor's handwriting. The argument addressed to the Court was that the account might have been in favour of the defendant like any banker's account and that the statement that the money was credited to the defendant's account did not imply the existence of a debt or the fact of part-payment. It was also contended that the accounts could not be looked into and that the document relied on should by itself show that there was a debt and a part-payment.

Held that the accounts might be looked into, that if a debt was found due, the payment was a part-payment appearing in the handwriting of the debtor and that the suit would be saved from the bar of limitation.

P. S. Sivaswamy Aiyar for appellant.

K. Ramachandra Aiyar (for *V. Krishnaswami Aiyar*) for respondents.

NOTES OF RECENT CASES.

Benson and
Boddam, JJ. }
1902, March 5.

C. M. A. No. 139 of 1901.

Civil Procedure Code, S. 266—Pensions Act—Attachment.

The arrears of Malikhana allowance (political pension) due to the late Zamorin of Calicut at the date of his demise which subsequently devolved on the appellant as heir of the late Zamorin but remained in the hands of Government undisbursed was sought to be attached in execution of a decree against the appellant. Objection was taken to the attachment on the ground that under S. 266 cl. (g) of the Civil Procedure Code and under S. 11 of the Pensions Act 23 of 1871 the arrears of Malikhana were exempt from liability to attachment. The Sub-Judge directed the attachment holding that S. 266, C. P. C., was no bar and that under Pensions Act the arrears were not "indelibly impressed with the privilege" even after their descent to the heirs of the pensioner (See 5 M.H.C371). On appeal their Lordships held on the authority of I. L. R., 1 B. 75, 18 M. 187 and 17 I. A. 181 that the death of the pensioner did not alter the character of the amount due and that the real principle of the provisions referred to was that the exemption from liability continued so long as the amount remained in the hands of Government.

A. S. Balasubrahmani Iyer for P. R. Sundara Aiyar for appellant.

Bhashyam Aiyangar
and Moore, JJ. }
1902, March 7.

S. A. No. 60 of 1901.

Specific performance—Contract by one on behalf of many—Parties—Conveyance whether binding on others.

Suit was one against the members of a joint Hindu family for specific performance (by execution of a conveyance) of a contract of sale of joint property entered into between the plaintiff and one of the members of the family. It was not alleged or proved that the other members of the family were

parties to the contract or authorised or ratified the contract. The District Munsif held that the member who entered into the contract was the managing member and that the contract was for the benefit of the family and decreed specific performance against all the members. The Sub-Judge on appeal directed the execution of the conveyance only by the party to the contract but also found that the contract was entered into for a family purpose and was binding on all the members. On second appeal, their Lordships held that the suit, being one for specific performance, ought to have been dismissed *in limine* on the face of the plaint as against the other members of the family who were not parties to the contract (See S. 27 of the Specific Relief Act) and that the question of the finding nature of the contract as regards the members not parties to the contract whether the contract or conveyance to be executed in pursuance thereof is or is not binding on the others could not well arise and be considered in a suit for specific performance.

V. Ramesam for appellant.

T. V. Seshagiri Iyer for respondents.

Benson and
Bhaskyam Aiyangar, JJ.
1902, March 20:

S. A. No. 867 of 1900.

Mortgage—Revenue—Default—Revenue sale—Repurchase by mortgagor—Subsequent mortgage—Priority.

The properties in question originally belonged to the 1st defendant who had mortgaged them to the 2nd defendant. Default having been made in payment of the Government revenue, the properties were sold and purchased by one Lingappa. The 1st defendant re-purchased the properties from Lingappa some time after the revenue sale and mortgaged them to the plaintiff who has now sued to recover the amount due to him on the mortgage by sale of the properties. The 2nd defendant claimed priority under his mortgage. The Courts below held that the Revenue sale operated as a statutory extinguishment of the mortgage in favour of the 2nd defendant under Act II of 1864 and that the mortgagee's claim against the property ceases under section 73 of the Transfer of Property Act IV of 1882 and decreed the plaintiff's claim. On second appeal by the

2nd defendant, it was contended that the Revenue sale was brought about by the default of the 1st defendant, that though the 2nd defendant could not set up his mortgage against Lingappa, the property became burdened again with the 2nd defendant's mortgage the moment it was purchased by the defaulter (the 1st defendant) himself from Lingappa, (section 65 of the Indian Trusts Act II of 1884) and that neither the 1st defendant nor the plaintiff who claimed under the 1st defendant subsequent to the re-purchase could be permitted to plead the 1st defendant's own wrong in making the default and the consequential Revenue sale as operating in extinguishment of the 2nd defendant's mortgage. - (10 M. I. A. 450, at p. 487).

Their Lordships upheld these contentions in an elaborate judgment and converted the suit into one for sale subject to redemption by the plaintiff of the 2nd defendant's mortgage and called for a finding as to what amount was due to the 2nd defendant under his mortgage.

M. C. Ramachandra Rao Saheb for appellant.

K. Jagannatha Aiyar for *K. R. Subramania Sastri* for respondent.

Bhashyam Aiyangar and
Moore, J.J.
 1902, March 13th.

S. A. No. 1252 of 1900.

Illegal distraint—Damages—Cause of action—Limitation.

A distraint was made of cattle by the landlord under the provisions of the Rent Recovery Act for arrears of rent due by tenant. The tenant got a Judgment in the Revenue Court that the distraint was illegal on the 7th September 1898. Subsequently the tenant took delivery of some head of cattle. He was then told that the others were dead and could not therefore be delivered. On the 26th December 1898, the present suit was instituted before the Revenue Court for damages for the loss of cattle under section 20 of the Rent Act. Some cattle had died even before the summary judgment setting the distraint aside; one died within a month of the present suit and two were living at the date of the suit but died subsequently.

Held that in respect of cattle which died before the previous summary judgment, the cause of action arose at least on the date of

the judgment if not on the date of the death of the cattle, and that the present suit being more than one month from such date the claim was barred as to them; that in respect of the cattle which died within a month, the plaintiff was entitled to recover compensation; and that in respect of cattle which died subsequent to the suit, the cause of action had not arisen on the date of suit and the plaintiff could recover it only by a fresh suit.

P. Nagabhushanam for appellant,

V. C. Seshachariar for respondent.

<i>Bhashyam Aiyangar and</i> <i>Moore, JJ.</i> <i>1902, March 13th.</i>	}	<i>S. A. No. 1235 of 1900.</i>
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Mortgage—Covenant—Personal decree.

In this case the District Munsif passed a decree for sale and gave a personal decree for any balance that might remain unsatisfied after sale. The District Judge set aside the personal decree on the ground there was no personal covenant contained in the mortgage deed. The deed provided for the payment of the debt and interest in 10 annual instalments on specified dates and went on to say that "I have consented to pay the various instalments on the various dates," that in default of payment enhanced interest should be paid and that "*should the mortgage debt remain wholly unsatisfied at the end of the date fixed for the last instalment, the mortgagor would, without objection, place the mortgagee in possession of the properties mortgaged to him.*"

The provision in italics was relied on by the District Judge as showing that the mortgagee should look to the land alone for his money. On second appeal,

Held that there was a covenant to pay, and that the right to sue for each instalment on the covenant was not cut down by the clause in italics.

P. S. Sivaswami Aiyar for appellant.

V. Ramesam for respondents.

Bhashyam Aiyangar } *S. A. No. 641 of 1901.*
and Moore, JJ.

Transfer of Property Act, S. 99—Purchase by mortgagee in execution of a decree for sale upon a subsequent mortgage—Illegality—Limitation.

The defendants who had a kanom of the plaint properties from the plaintiff's predecessor in 1864 purchased the equity of redemption in execution of a decree for their sale upon a subsequent mortgage. This purchase was in 1879 when plaintiff was a minor. The plaintiff brought this suit to redeem the kanom of 1864 and when confronted with the purchase by the defendants in 1879, contended that the sale was in contravention of the provisions of S. 99 of the Transfer of Property Act and was invalid and that the purchaser having been a mortgagee must hold the lands subject to the plaintiff's right of redemption.

Held that the sale did not contravene S. 99 as the property was sold in execution of a decree for sale ;

Held also that the mortgagee purchaser was under no obligation to hold the property purchased by him in trust for his mortgagor.

Where a first mortgagee purchases the equity of redemption in execution of a decree for sale passed upon a second mortgage, the mortgagor's equity of redemption is extinguished and the property becomes the absolute property of the first mortgagee. I. L. R., 24 M. 96 followed and I. L. R., 23 M. 377 dissented from.

Held also that even if the sale was invalid, the suit was barred as it was not brought within one year of the sale or of the date on which the plaintiff became a major. I. L. R., 25 B. 337 followed.

J. L. Rosario for appellant.

Ryru Nambiar for respondent,

Benson and } *S. A. No. 987 of 1900.*
Boddam, JJ.

Zemindar—Inam—Assessment—Rent—Implied contract—Limitation.

In this case it was held that although the holder of an in in a Zemindari had for about forty years been paying to the

Zemindar more than the amount which the Zemindar was entitled to collect from him under Regulation XXV of 1802, no contract to pay such larger amount could be implied because (1) the Regulation prohibited the levy of any larger assessment than was specified therein as granted to the Zemindar, (2) no consideration was alleged or provided for the payment of the additional amount, and (3) the defendant had been promising to remit the excess collections.

It was also held, as to the objection that a suit for a declaration that the inamdar was entitled to be discharged on payment of the smaller amount was barred as it was not brought within 6 years of the first illegal exaction 40 years ago, that the cause of action arose on the date of each annual exaction and that the suit was not barred.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Justice Davies,
and *Justice Bashyam*
Aiyangar, JJ.

S. A. No. 805 of 1900.

Provincial Small Causes Court's Act IX of 1887—Sch. II Art. 35 (c)—Malicious prosecution—Action for Civil Procedure Code, Section 580—Second Appeal.

The defendant maliciously informed the Police that certain articles which had been stolen from his house were in the possession of the plaintiff and that the Police would find them in the plaintiff's house on search. The Police acting on this information searched the plaintiff's house, but found none of the articles there. The plaintiff therefore instituted this suit against the defendant for damages caused by the illegal search. The amounts claimed was Rs. 500. Both the District Munsif and the District Judge decreed the plaintiff's claim. In the High Court the question whether a second appeal lay was raised.

Held that no second appeal lay. The action was not, in law, an action for malicious prosecution and Art. 35(c) of Schedule II of Act IX of 1887 cannot therefore apply. The plaintiff's action, was an action for trespass. The value of the suit not having been over Rs. 500, section 586, C. P. C., was a bar to the second appeal.

C. V. Ananthakrishna Aiyar for *P. R. Sundara Aiyar* for the appellant.

C. V. Krishnaswami Aiyar for *V. Krishnaswami Aiyar* for the respondent.

NOTES OF RECENT CASES.

Bhashyam Aiyangar }
and *Moore, JJ.* }
12th March 1902.

S. A. No. 1071 of 1900.

Plaintiff obtained a mortgage from the 6th defendant and agreed to discharge out of a portion of the mortgage amount several prior mortgages and to pay the balance in cash to the mortgagor. Plaintiff brought the suit to redeem one of the prior mortgages, and his suit was dismissed by the lower courts on the ground that the plaintiff did not pay the balance of the mortgage amount.

Held in second appeal reversing the decrees of the courts below (1) that the undertaking by the plaintiff a subsequent mortgagee to pay off and redeem an outstanding prior mortgage was itself a sufficient consideration in law to support plaintiff's subsequent mortgage, (2) that it was not open to the mortgagor to defeat the puisne mortgagee's suit for redemption of a prior mortgage in accordance with the undertaking by showing that a part of the consideration had not been paid, and (3) that the mere fact that a portion of the consideration had failed or had not been paid by the plaintiff did not vitiate his mortgage and disentitle him to maintain a suit for redemption of the prior mortgage.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

P. K. Nambiar for respondent.

Bhashyam Aiyangar }
and *Moore, JJ.* }
25th March 1902.

S. A. No. 841 of 1900.

Plaintiffs, mulgars, granted a mulgeni chit to the predecessors in title of the defendants. The lease stipulated, among others, that the lessees should not transfer the interest to others. The defendants claimed under an alienation from the lessees, and the plaintiffs

sued to eject them. There was no express provision for re-entry on breach of any of the stipulations in the lease. The courts below decreed the plaintiffs' claim.

The High Court on second appeal reversed this decree holding that the mere fact of a breach would not enable the plaintiffs to eject the tenant unless there is an express provision for re-entry on such breach.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellants.

O. Ramachendra Row Saheb and *K. P. Madhava Rao* for respondents.

The Chief Justice
and *Benson, JJ.*,
26th March 1902.

O. M. P. No. 147 of 1901.

Suit by plaintiffs to eject their tenants, the defendants. The latter pleaded that they disclaimed plaintiffs' title and paid no rent for over 20 years since disclaimer and that hence the plaintiff's suit was barred. On second appeal, the High Court held that a mere disclaimer by the tenant would not do unless the landlord elected to treat such disclaimer as a ground of forfeiture of the lease. This decision is reported in *1. L. R., 24 M. 246*. The above petition was for a review of this decision.

Held, (1) that the court had jurisdiction to review its decision on the ground of a mere error of law and (2) that a tenancy from year to year was not determined *ipso facto* by the tenant's disclaimer of the landlord's title at the end of the current year but could only be determined by due notice to quit or by the landlord's electing to treat by an overt act the tenant's disclaimer as a forfeiture of the lease.

J. P. Wallis (Advocate-General), for petitioner.

A. S. Balasubrahmaniam Aiyar for *P. R. Sundara Aiyar* for counter-petitioner.

Benson and Bhashyam
Aiyangar, JJ.

S. A. No. 1206 of 1900.

Provincial Small Cause Courts Act, Art. 3—Second appeal—Suit against a public officer for an official act—Whether suit will lie.

A suit against a moniegar for damages for illegal detention of crops for alleged arrear of revenue when the same is not due, is not a suit of a small cause nature, as it falls within the exception provided by Art. 3 of the schedule to the Provincial Small Cause Courts' Act.

A suit for damages for an illegal act done by a public officer in his official capacity will lie against such officer. The aggrieved party may sue the Secretary of State, but he is not precluded from suing the officer who was guilty of the tort.

T. Rangaramanujachariar for appellant.

C. Mahadeva Aiyar for respondent.

Davies and Bhashyam Aiyangar, JJ. } *S. A. Nos. 706 and 707 of 1900.*

Hindu Law—Widow—Alienation—Adoption—Validity of alienation against adopted son.

An alienation by a Hindu widow of properties which she inherited from her husband is good during her lifetime; and a son subsequently adopted by her cannot, any more than a reversioner, recover the properties so alienated during her lifetime. When the alienation is made for purposes which will make it absolutely binding on the reversioner, it is likewise binding on the adopted son.

P. R. Sundara Aiyar for appellant.

Joseph Satya Nadar for appellant.

Davies, Bhashyam Aiyangar and Moore, JJ., (F. B.) } *L. P. No. 18 of 1902.*
23rd April 1902

Letters Patent—Refusal of a single judge to interfere with an order of sanction—Appeal.

The decision of a single judge of the High Court refusing to interfere with an order granting sanction to prosecute under section 195, Criminal Procedure Code, is appealable under S. 15 of the Letters Patent.

V. Krishnasami Aiyar and *P. R. Sundara Aiyar* for appellant.

The Public Prosecutor for the Crown.

*Benson and Bhashyam
Aiyangar, JJ.* } *C. M. A. No. 164 of 1901.*
15th April, 1902.

In a suit for redemption a decree was passed for the plaintiff, and it was eventually confirmed by the High Court; but the amount payable for redemption was not ascertained and inserted in the decree. On an application to the Court of First Instance, the amount payable by the mortgagor to the mortgagee was determined by that Court. Against this order a miscellaneous appeal was preferred under S. 244 of the Code of Civil Procedure. Two objections were taken to the appeal, (1) that the decree-holder should have moved the High Court to amend its original decree by the insertion of the amount payable to the mortgagee, and (2) that a regular appeal would lie and not a miscellaneous appeal under S. 244, C. P. C.

Held, that the word 'Court' in S. 92 of the Transfer of Property Act included the executing Court and therefore, the amount payable was properly determined by the first court, and that as the determination of the amount was in execution, a miscellaneous appeal on two rupees stamp was rightly preferred.

C. Krishnan for appellants.

P. R. Sundara Aiyar for respondent.

*Benson and
Bhashyam Aiyangar, JJ.* } *S. A. No. 1176 of 1900.*
18th April 1902.

Civil Procedure Code, S. 13, Exp. 5—Representative suit—Res-judicata.

Where a decree has been passed against a person who sues or is sued in a representative capacity, the person or persons represented by him are bound by the decree in the absence of any fraud or collusion. Negligence in the conduct of the suit, however gross, if it did not amount to fraud or collusion will not entitle him or them to avoid the decree.

A karnavan brought a suit to have a decree passed against his predecessor set aside, and it was dismissed. The present suit was by the junior members for the same relief, and the plaintiffs

who were met by the plea of *res-judicata* alleged that their karnavan was guilty of gross negligence in the conduct of that suit and did not file certain material documents.

Held that the suit was barred by Exp. 5 to section 13 as the previous decree was not alleged to have been obtained by fraud or collusion.

C. V. Anantakrishnaiyar (for P. R. Sundara Aiyar for appellant.)

K. Narayana Rao for respondent.

Bhashyam Aiyangar and }
Moore, JJ. }
24th April 1902. }

S. A. No. 1147 of 1900.

Civil Procedure Code, S. 368—Defendant's representative—Decree effect of—Mortgage decree—Income-tax sale—Purchaser's right—*Lis pendens*.

A person brought on the record as the representative of a deceased defendant effectually represents the deceased's estate for the purpose of the suit. It is open to the person so joined to disclaim that he is the representative, and the true representatives may also ask to be joined. But where neither of these things has happened and a decree is passed against the person brought on the record, the decree is in the absence of fraud or collusion binding on the estate of the deceased and on all his representatives, although the person added as representative may happen to be only one of the representatives or no representative at all.

S. 30 of the Income-tax Act provides only that income-tax may be levied as if it were land revenue and the purchaser of land at an income-tax sale does not take the land free of encumbrances as in the case of a sale of land for arrears of revenue.

Where properties were purchased at an income-tax sale held after a decree of a Civil Court for sale of those properties but before actual sale by the Civil Court it was held that the purchaser was subject to *lis pendens* and that unless he avoided the sale of the properties in execution of the decree of the Civil Court by payment of mortgage money, the purchaser at such Civil Court sale would acquire an absolute right to the property.

NOTES OF RECENT CASES.

Before the Chief Justice,
Bhashyam Aiyangar and } *S. A. Nos. 1095, 1096, 1271 and 1272*
Moore, JJ. } *of 1900.*
8th August 1902.

Rent Recovery Act, S.10—Judgment of Revenue Court—Landlord's right to eject—Proof of tender.

After judgment by a Revenue Court under S.10 of the Rent Recovery Act settling the terms of a patta, a fresh tender by the landlord is necessary whether the Judgment approved of the patta or amended it. It is not open to the landlord to eject his tenant without proof of such tender.

V. C. Seshachariar for appellants in S. A. 1095 and 1096.

T. V. Seshagiri Aiyar for respondents in the above appeals.

V. Visvanatha Sastri for *K. Naraina Rao* for appellants in S. A. 1271 and 1272.

P. R. Sundara Aiyar and *A. S. Balasubrahmanya Aiyar* for respondents in the above.

The Chief Justice,
Mr. Justice Benson and }
Mr. Justice Bhashyam } *S. R. No. 5488 of 1902.*
Aiyangar. }
7th August 1902.

Madras Act I of 1889, S. 8—Appeal—Right of audience.

Where a statute confers a right of appeal, it conveys with it by implication the right to audience also. It was held accordingly that a Village Munsif who has, under s. 8 of the Madras Village Courts Act I of 1889, a right to appeal to the High Court against an order suspending or removing him for misconduct in the discharge of his judicial functions, is entitled to be heard in support of his appeal.

K. N. Aiya and *S. Srinivasa Aiyangar* for appellant.

The Chief Justice,
Mr. Justice Benson and }
Mr. Justice Bhashyam } *L. P. A. No. 17 of 1901.*
Aiyangar. }
5th August 1902.

Res judicata—Suit as reversioner—Suit as immediate heir—Civil Procedure Code, S. 13.

The last male owner of the plaint properties was the cousin of the plaintiffs. The 1st defendant was the adoptive step-mother of

of the last owner, she not having joined her husband in the adoption. On the last male owner's death, she took possession of his properties ostensibly as his heir and made certain alienations. The plaintiffs' father in whom the right of inheritance had really vested brought a suit in 1890 to have it declared that he was next reversioner to the estate, and that certain alienations made by the 1st defendant would not affect the reversion. The suit was dismissed so far as the alienations were concerned, but the decree declared that the other properties should go to him after her death. After the decision in the *Uthumalai case* that the wives of the adoptive father who did not take part in the adoption were in the position of step-mothers to the adopted son, the plaintiffs brought this suit to recover immediate possession of the properties alleging the facts as in the previous plaint, and stating that their father who was immediate heir and as such entitled to possession of properties sued as reversioner by a mistake of law and that they were entitled to recover the properties as his heirs. The question was whether the suit was barred.

Held—

- (1) that the cause of action being different, S. 43, C. P. C., was no bar to the suit.
- (2) that the two claims were so inconsistent that the present claim could not have been urged in the previous suit and Explanation II to S. 13, C. P. C., did not bar the suit;
- (3) that no action to set aside a decree on the ground of mistake would lie and Art. 96 of the Limitation Act would not therefore apply;
- (4) that although if the previous decree had simply dismissed the suit, the question of reversionership would not have been *res judicata* either expressly or by implication, as the decree would then be made not in consequence of such finding, but in spite of it, yet as the decree rightly or wrongly declared the plaintiff's right as reversioner, the present suit was barred by the previous decree.

Mr. Justice Bhashyam } Cr. Rev. Case No. 304 of 1902.
Aiyangar.

Criminal Procedure Code, Ss. 195, 439, 478—Civil Procedure Code, S. 622—Civil Court granting sanction—The refusal of District Judge to revoke—Revision.

Where a criminal revision petition was preferred against the order of the *Sessions* Judge refusing to revoke the sanction granted by the District Munsif:—

Held,—

- (1) that the District Munsif was a civil court in dealing with the application ;
- (2) that the appeal lay to the District and not the Sessions Judge ;
- (3) that no appeal lay to the High Court against the order of the District Judge refusing to interfere, because it was the District Munsif that granted the sanction and an appeal from him would not ordinarily lie to the High Court.
- (4) that the order could not be revised under s. 439, Cr. P. C., because it was only the records of a criminal court that could be called for by the High Court under that section ;
- (5) that in a proper case the order of the District Judge might be revised under s. 622, C. P. C.

Obiter:—

1. If the District Court granted or revoked the sanction which the District Munsif refused or granted an appeal would lie under s. 195, Cr. P. C.

2. If a charge is framed and the accused is committed to the Sessions under s. 478, the Court must be deemed a Criminal Court and s. 439 may apply to such a case.

K. Narayana Row for petitioner.

Before Boddam and } S. A. 1196 of 1900.
Bhashyam Aiyangar, JJ.
23rd July 1902.

Limitation Act—S. 12—Time taken in obtaining copies—Copies not obtained by appellant.

Suit for dissolution of partnership and account and for the recovery of the plaintiff's share of the assets. The Munsiff passed a certain decree. The plaintiff having died a few hours before the

judgment of the Munsif was pronounced, his minor sons preferred an appeal to the Sub-Court against the decree of the Munsif admittedly out of time unless the time occupied in obtaining the copies of the decree filed along with the appeal were excluded in the computation of time. But objection was taken before the Sub-Court to such exclusion in the computation on the ground that the copies of the decree and judgment filed along with the appeal were not obtained by the appellants but by one of the respondents in the appeal (2nd defendant) and that the appellants could not claim the benefit of the time occupied to such respondent in obtaining the copies. The Sub-Court held that the appellant was entitled to the exclusion inasmuch as S. 12 of the Limitation Act did not specify that the application for copies should have been by the appellant. On second appeal by the defendants 3 and 4—

Held, that an appellant can claim the benefit of the time occupied in obtaining copies of judgment and decree only when the application for copies is made by himself.

Mr. V. Krishnaswami Iyer for appellant.

Mr. P. S. Sivaswami Iyer for respondent.

Full Bench.
Chief Justice, Benson }
& Bhashyam Aiyangar } *C. R. P. 453 of 01.*
gar, JJ. 31st July 1902.

Civil Procedure Code S. 408—Leave to sue in forma pauperis—Scope of inquiry.

Plaintiff put in a petition for leave to sue in *forma pauperis* to the District Munsif, who thereupon sent the required notice under S. 408, C.P.C., to the respondent. The respondent put in some documents bearing on the merits of the case itself on receipt of which the District Munsif dismissed the suit as bad on the merits.

On the question being raised whether the District Munsif was competent to take evidence as to the merits or should merely have confined himself to the question of plaintiff's pauperism :

Held, that the District Munsif ought to have confined himself to the enquiry into the plaintiff's pauperism.

• I. L. R., 4 M. 323 approved. I. L. R., 19 M. 197 not followed.

S. Subramanya Aiyar and *S. Venkataramana Aiyar* for appellant.

V. Visvanatha Sastri for respondent.

NOTES OF RECENT CASES.

Mr. Justice Bhashyam }
Aiyangar and
Mr. Justice Moore. } A. S. 70 of 1902.
 29th August 1902.

Court Fees Act, S. 17—Suit by mortgagee holding four mortgages—Stamp on aggregate.

This was a reference made by the Registrar, High Court, under S. 28 of the Court Fees Act. A mortgagee holding four mortgages over the same property executed by the same mortgagor, brought a suit for sale of the mortgaged properties as on a single mortgage, but impleading the other mortgages. He paid court fees calculated severally on each mortgage amount. All the amounts due on the different instruments had become due. A decree was passed in his favour. The mortgagor appealed, but paid court fee only on the aggregate amount due on all the mortgages. The mortgagee through his vakil intimated to the Registrar that the suit was insufficiently stamped; hence this reference.

Held :—The court fee payable is only on the aggregate amount due on all the mortgages as the mortgagee is bound to unite all his mortgages in the same suit.

P. R. Sundara Aiyar for appellant.

C. R. Thiruvengkatachariar for respondent.

Mr. Justice Bhashyam }
Aiyangar and
Mr. Justice Moore. } C. M. S. A. 87 of 1901.
 20th August 1902.

Civil Procedure Code, Ss. 232, 246—Transferee decree-holder—Benamidar for Judgment-debtor's judgment-debtor—Discretion of court.

On application by a transferee decree-holder, the judgment-debtor objected *inter alia* that the transfer of the decree was really in favour of the judgment-debtor of the latter as against whom a set-off under S. 246, C. P. C., could be claimed, and that, therefore, the nominal transferee and benamidar should not be allowed to

execute. The Munsif held that S. 246 could have no application until the transfer is recognised (under S. 232), and that the transfer should be recognised first and then the judgment-debtor may have the right to show that the transferee is merely a name-lender for her judgment-debtor. The District Judge on appeal held that the fact that an assignee-decree-holder is a bena-midar is not a sufficient reason for refusing to recognise the assignment. On second appeal,

Held, that the recognition or otherwise of an assignment of a decree is not a step or act recognised by the C. P. Code, that a discretion is given to the courts to allow an assignee to execute or not and that the discretion could properly be exercised only after deciding the question as to whether the assignment was really in favour of a judgment-debtor of the judgment-debtor with right of set-off under S. 246, C. P. C.

P. R. Sundara Aiyar for appellant (Judgment-debtor).

T. V. Seshagiri Aiyar for respondent (Transferee decree-holder).

*The Chief Justice,
Mr. Justice Bhashyam
Aiyangar and
Mr. Justice Moore.*

Ref. Case No. 14 of 1901.

Stamp Duty—Reference by Board—Collector's certificate, finality of—Board's powers of control—Stamp Act, Ss. 40, 56, 57.

When a Sub-Registrar, before whom a document was produced for registration, sent it to the Collector as being stamped with insufficient duty, and he, being of opinion that the document was properly stamped, granted a certificate to that effect (which, under clause 2 of S. 40, was conclusive), it was held that the decision of the Collector could not be disturbed by the Board. The High Court declined to decide this reference made by the Board of Revenue, on the ground that their decision was of no use to the Board as it could not interfere with the conclusive certificate of the Collector.

T. Rāṅgachariar for the acting Government Pleader.

Mr. Justice Bhashyam }
 Aiyangar and
 Mr. Justice Moore. } C. B. P. No. 5 of 1902.
 20th August 1902.

Appeal in formā pauperis—Appeal in person—Civil Procedure Code, S. 592.

An application to prefer an appeal in *formā pauperis*, unlike one to prefer a suit, does not require to be presented in person. S. 592, C. P. C., does not say that the *presentation* of an application to be allowed to appeal as a pauper is governed by the provisions relating to *suits* in *formā pauperis*.

The application to appeal was presented in time by the applicant's vakil. The judge returned it saying that the party should present it in person. When the party presented it, it was more than a month from the date of the judgment of the lower court and the judge dismissed it as barred. *Held*, that it was presented in time by the vakil and that the judge should have accepted the application and dispose of it on the merits. I. L. R., 8 M., 504 not followed.

V. Ramesam for K. Narayana Row for petitioner.

C. Krishnan and K. P. Madhava Row for respondent.

Mr. Justice Bhashyam }
 Aiyangar and
 Mr. Justice Moore. } C. M. A. No. 39 of 1902.
 22nd August 1902.

Redemption—First mortgage of A—Subsequent mortgage of A, B, C—Decree on each in the absence of the other mortgagee—Purchase of A by decree-holder in execution of first mortgage decree—Subsequent purchase of A, B, C by the decree-holder in execution of his 2nd mortgage decree—Suit of the 2nd mortgagee to redeem 1st.

Where there are two successive mortgages on a property and the first mortgagee purchases the mortgagor's equity of redemption, the 2nd mortgagee is entitled to a decree for redemption of the 1st mortgage. The first mortgagee as purchaser of mortgagor's rights can then bring a suit for redemption of the 2nd mortgagee on payment of the amount of both the mortgages.

In 1890 there was a mortgage of A to defendant. In 1891 there was a mortgage by the same mortgagor of A, B and C to the plaintiff. Defendant sued on his mortgage in 1892, obtained a decree for sale and in execution purchased A. Plaintiff was no party to this suit. Later on the plaintiff sued without making defendant a party and in execution of his decree purchased A, B and C. Plaintiff now sued to redeem A from defendant on payment of the debt due to him as first mortgagee. Defendant contended that as purchaser of the equity of redemption vested in the mortgagor originally, he was entitled to redeem plaintiff on payment of his decree amount minus sale proceeds of B and C in execution. The District Munsif upheld the defendant's contention. The District Judge held that the plaintiff was entitled to redeem and remanded the suit. On appeal against the order of remand:—

Held, that redemption was rightly decreed and that the defendant must be left to seek his remedies as the purchaser of the mortgagor's equity of redemption in a separate suit framed for the purpose.

V. C. Desikachariar for appellant.

P. S. Sivaswami Aiyar for respondent.

<i>Mr. Justice Bhashyam</i> <i>Aiyangar and</i> <i>Mr. Justice Moore.</i> 22nd August 1902.	}	<i>C. M. S. A. No. 66 of 1901.</i>
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Execution—Purchase in auction sale—Payment—Confirmation of sale—Wrongful refund of purchase-money—Order directing purchaser to redeposit—Decree-holder's remedy.

When once the purchaser of properties in execution has deposited the purchase money into court and the sale has been confirmed, the decree-holder has a right to the money (unless of course the sale is set aside), and it is only for the balance, if any, that he can proceed against the judgment-debtors. If the money has been wrongly paid back to the purchaser, the decree-holder may have his remedies against the purchaser, but cannot proceed against the judgment-debtors to the extent of that amount.

In this case the purchaser paid the amount in time. An application to set aside the sale was dismissed by the District Munsif and the sale was confirmed. On appeal, the sale was set aside. A second appeal was preferred to the High Court. But in the meanwhile the purchase-money had been returned to the purchaser. The High Court restored the order of the District Munsif and affirmed the validity of the sale. Thereupon the purchaser was called upon to repay the money. He having defaulted, the property was again sold and fetched less than the decree amount (though at the first sale the purchaser had bid for and paid more than the decree amount). The judgment-debtors now sought to have it declared that they were not liable for the balance. The decree-holder contended that they were liable as it was owing to their proceedings the purchaser was enabled to take the money from court and that the balance on resale might be recovered from the debtors, who should be left to proceed against the purchaser for default.

Held, that this was not a case of resale for default of purchaser under the C. P. C., that the order directing the purchaser to repay was the one under execution, that the decree-holder must recover the balance from the purchaser and that the judgment debtors will also be entitled to recover from the purchaser the surplus due to them under the original sale.

K. P. Govinda Menon for appellant.

A. Nilakanta Aiyar for respondent.

<i>The Chief Justice, Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar. 1st August 1902.</i>	}	<i>L. P. A. No. 16 of 1901.</i>
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Purchase of plantation—Lease of the plantation site—Mortgage of plantation—Termination of lease—Rights of mortgagee.

Where a plantation standing on land is sold as a plantation, the vendee becomes owner of a part of the freehold and the residue is in the owner of the land.

The owner of a plantation can mortgage or sell it as he likes.

A plantation of plantains must be considered to be the same, although the plantains at the time of sale have all died and new

trees grown out of the shoots of the old ones have taken their place.

In 1877 the 3rd defendant sold a plantation to defendants 1 and 2 and also leased to them for 3 years the land on which the plantation stood. The defendants 1 and 2 executed a mortgage of the plantation to 3rd defendant in 1877, a second to plaintiff in 1887 and a third in 1892, of which the 3rd defendant became the assignee. The first was paid off in 1889, and in execution of a decree for sale on the 3rd mortgage, the 3rd defendant purchased the plantation subject to plaintiff's mortgage. In this suit, *Moore, J.*, and the lower courts held that the defendants 1 and 2 lost their right at the termination of the lease. On appeal,

Held, that the ownership of the plantation was not affected by the termination of the lease of land and that the plaintiff was entitled to a decree, especially as the sale to the 3rd defendant was made subject to the plaintiff's rights.

P. R. Sundara Aiyar and K. Srinivasa Aiyangar for appellant.

T. V. Seshagiri Aiyar for respondent.

<i>Mr. Justice Boddam and</i> <i>Mr. Justice Bhashyam</i> <i>Aiyangar.</i> 14th August 1902.	}	<i>C. M. S. A. No. 15 of 1902.</i>
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Civil Procedure Code, S. 246—Cross-decrees—Notice of assignment—Set-off

Where a decree is sought to be executed by an assignee decree holder, the judgment-debtor may seek to set off against it, not only decrees which he may have had against the original decree-holder prior to the date of the assignment, but also all such decrees obtained after it but prior to the date on which notice of the assignment of the decree is served on the judgment-debtor; that is to say, until notice of assignment is given to the debtor, the original decree-holder continues to be the decree-holder for the purposes of set off under S. 246, C. P. C.

P. S. Sivaswami Aiyar for appellant.

Mr. Justice Bhashyam
Aiyangar and
Mr. Justice Moore. } S. A. No. 102 of 1901.
30th August 1902.

*Suit for land—Trespass—Extent found by Commissioner—
Decree for more land than prayed for in the plaint.*

Where a suit to recover land is brought on the allegation of trespass at one point of time and trespass at another point of time is found, decree should be given unless the suit were barred.

A deed of partition between plaintiff and defendant was executed in 1888, by which each took a half of various items of family property. The extent of the shares of each in the items were given in accordance with the measurements in the Revenue Register. The plaintiff brought this suit to recover the difference between the measurements in the deed and the extent of land actually in his holding, on the allegation that the defendant trespassed on the portions claimed in 1895. The defence was that the deed was executed to evidence a partition made long prior to 1888. This, though believed by the District Munsif, was denied by the Judge. The Judge therefore gave the plaintiff a decree for half of each plot as measured by the Commissioner minus land in his possession. On second appeal this decree was impeached on two grounds: (1) that the alleged trespass was found against, (2) that in some items plaintiff got more than he claimed.

*On the 1st point :—*As in 1888 the plaintiff was entitled to half of each item he was entitled to recover the deficiency in a suit brought within 12 years of that date, whether he made out the trespass of 1895 or not.

*On the 2nd point :—*As the substance of the claim was that he was entitled to half of each plot, he was entitled to recover the deficiency, though the plaint asked for less on the basis of the revenue measurements which happened to be wrong. Strictly speaking, the plaint must have been amended in accordance with the commissioner's measurements.

T. V. Seshagiri Aiyar for appellant.

P. S. Sivaswami Aiyar for respondent.

Mr. Justice Bhashyam }
 Aiyangar and } L. P. A. 18 of 1901.
 Mr. Justice Moore. }
 21st August 1902.

Account stated, what—Limitation Act, Art. 64.

Where payments had been made in respect of moneys due and the debtor gave a writing showing principal and interest due and the various payments made and the balance then due, there is an account stated within the meaning of Art. 64 of the Limitation Act.

Although an acknowledgment by a partner may not avail against a co-partner by reason of the provisions of S. 21 of the Limitation Act, an account stated by a partner (whether before or after the period of limitation) will give a cause of action against the co-partner also and the debt may be recovered within 3 years under the terms of Art. 64.

The plaintiff had lent moneys to the defendants who were shopkeepers and occasionally purchased things from them. The last payment in the shape of articles supplied for interest was on 9th January 1897. The account was stated by the 1st defendant in writing on the 26th October 1897 and the suit was filed on 15th October 1900. The 2nd defendant was a minor at the time of the statement of account. The defendant's contention was (1) that there was no account stated *as there were no cross demands* (23A 502, 15A 1, 22B 513); (2) that it was only an acknowledgment by the 1st defendant which would not avail against the 2nd defendant; and (3) that even if it were an account stated, the 1st defendant had no business to bind the 2nd defendant by it. The plaintiff pointed out that cross demands were not necessary for an account stated within Art. 64, but that if necessary there were such demands in this case as payments debited to him were due for goods supplied.

The Court held that there were cross demands here, but that no cross demands were necessary to constitute an account stated, that a partner's statement of accounts done in the course of business was binding on the co-partner (though a mere acknowledgment might not be) and that the 2nd defendant was liable equally with the first.

T. V. Seshagiri Aiyar for appellant.

C. Krishnan and K. P. Madhava Row for respondent.

Full Bench. Chief Justice, Benson and Bhashyam Iyengar, JJ. 13—8—02. } C. M. A. 19 of 1901.

Limitation Act, Sch. II, Art. 179, cl. 2—“From the date of the appellate decree”—Appeal as to part only—Execution of the unappealed portion—Limitation—Civil Procedure Code, S. 230, cl. a.

Where an appeal is preferred against a portion only of the decree, and execution is sought to be had of the unappealed portion three years after the date of the original decree but within three years of the date of the decree of the appellate court in the appeal regarding the portion appealed against:—

Held, that the application was not barred. The words “appellate decree” mean the decree of the appellate court whether on an appeal against a portion only or the whole of the original decree.

Per Bhashyam Iyengar, J.—Where there are several appeals against different portions of the decree and they are disposed of on different dates, limitation for execution will run only from the date of the decree last passed.

Per Curiam.—Even under S. 230, cl. a, C.P.C., appellate decree means the decree in appeal whether the appeal was against a portion only, or the whole, of the original decree.

I. L. R. 12 M. 479 overruled. I. L. R. 23 M. 60 approved.

T. Rangachariar for appellant.

V. Krishnaswami Aiyar for 6th respondent.

T. V. Seshagiri Aiyar for 5th respondent.

Davies and Benson, JJ. } A. 59 of 1901.
25—8—1902.

Suit by assignee of mortgage for money—Plea of want of consideration by mortgagor—Presumption of intention to defraud creditors.

A mortgagor cannot plead want of consideration for the assignment in a suit by the assignee of the mortgage for money due under the mortgage.

No presumption of intention to defraud creditors can be drawn from the mere fact of indebtedness of the assignor on the date of assignment.

Bhashyam Iyengar and
Moore, J.J. } Cr. R. Case Nos. 146 & 168 of 1902
 26—8—1902.

Criminal Procedure Code Ss. 133 and 136—"Injurious to Public comfort"—Opening of a new market—Harassing competition between rival market-holders.

A new market was opened by the side of an old one by a different individual, in both of which trade was carried on in "cattle and other things." The magistrate of the place on receiving information that on account of the rivalry between the old and new markets, the public who went there for purchase were harassed and were forcibly dragged from one market to another, passed a conditional order closing the new market under S.133, Cr. P.C., on the ground that the holding of the new market was "injurious to the comfort of persons resorting to the said place". The order was duly made absolute under S. 136, Cr. P. C. With regard to the question of the new market being "injurious to public comfort," the Magistrate said: "'Noxiousness' and 'injuriousness' are of course relative. No trade can be really 'in itself' noxious in a sense which contradicts the last proposition. If a trade which causes a bad smell is noxious, it is so, so far only as there are people to be affected by the smell; in the same way the holding of the new market in the neighbourhood of the old market on the same day is 'injurious to the comfort of the community'".

On revision—

Held, that the Magistrate's order under Ss. 133 and 136 was illegal and that the holding of the market could in no sense be "*injurious to the health or physical comfort of the community*" within the meaning of the words in S. 133.

V. Ryrū Nambiār for petitioner.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for respondent.

NOTES OF RECENT CASES.

Benson and Moore, JJ. } *S. A. No. 134 of 1901.*
1st September 1902.

Abkari Act, S. 22—Sub-letting and assignment without sanction of Collector—Illegality of contract.

This was a claim for the recovery of Rs. 156-0-0, being the balance of the value of 159 gallons of arrack and profit on 111 gallons and 32 drams of arrack received from plaintiff according to an agreement, dated 5th December 1896, executed by the 1st defendant's father and the 2nd defendant in favor of plaintiff who is a licensee of the arrack shop at Sompeta for 1896-1897. On the preliminary objection that the agreement was illegal and invalid, as one made without the sanction of the Collector required by S. 22 of the Abkari Act, and the clause in the license granted to the plaintiff, the District Munsif dismissed the suit. The District Judge upheld his decision. Hence this second appeal.

*Held:—*That the contract was illegal for want of the Collector's sanction and could not be enforced.

V. C. Seshachariar for appellant.

V. Ramesam for respondents.

Davies and Bhashyam. } *C. R. P. 348 and 349 of 1901.*
Aiyangar, JJ.
9th September 1902.

Provincial Small Cause Courts Act, Art. 31—Suit for mesne profits—"Suit of a Small Cause nature."

*Held:—*According to the ruling in *Savarimuthu v. Aithurusu Bowthan*¹, when read with the order of reference therein, every suit for mesne profits is exempted from the cognizance of the Small Cause Court, under Art. 31 of the Provincial Small Cause Act.

T. V. Seshagiri Aiyar for petitioner.

V. Krishnaswami Aiyar for respondent.

Chief Justice and
 Davies, J. } L. P. A. 6 of 1902.
 4th September 1902.

Power of attorney—Canon of construction.

Plaintiff sued defendants 1 and 2 on a promissory note executed by 2nd defendant. 1st defendant had executed a power of attorney to 2nd defendant to the effect “* * * You may personally conduct all actions and proceedings that are to be taken on my behalf * * * before all private gentlemen * * *.” It was alleged that the 2nd defendant executed it on behalf of the 1st defendant. Both the District Munsif and Moore, J., on revision, held that the power of attorney was very wide and included the power to borrow on behalf of the 1st defendant. Hence this Letters Patent Appeal.

Held :—That powers of attorney should be construed strictly and that the power of attorney in this case could not be taken to have authorized borrowing.

K. Subrahmanya Sastri for *V. Ramesam* for appellant.
 Respondent was not represented.

Bhashyam Aiyangar,
 and *Moore, JJ.* } S. A. No. 1529 of 1901.
 29th September 1902.

Rent Recovery Act, S. 11, proviso 2—Grant of land for building purposes—Conditions not fulfilled—Binding character of the grant on successor.

On 21st March 1850, Rani Parvathavarthani Nachiar, the late Zemindarni of Ramnad, granted a plot of ground to the S. P. G. Mission free of rent for purposes of erecting a building. The plaintiff on behalf of the Mission was the holder of the patta of this land. No building was ever erected on the land and the defendants, the lessees of Ramnad, assessed the land and tendered a patta fixing a certain rate of rent. On the rent not being paid the lessees attached the land. The plaintiff brought this suit to cancel the attachment. The Head Assistant Collector held that the grant only stood on the same footing as a patta at favorable rates and was not binding on the lessees. He, therefore, dismissed the suit. On appeal, the District Judge held that the grant was not a patta but a deed of gift and that S. 11, cl. 9, proviso 2 of

Act VIII of 1865 did not apply. He, therefore, allowed the appeal and cancelled the attachment.

On second appeal, the High Court held that the grant was only a patta and that S. 11, cl. 2, proviso 2, applied, and that the successor of the Zemindar, therefore, had a right to pay the assessment.

T. Bangaramanuja Aiyangar for appellant.

Joseph Satya Nadar for respondents.

<i>Benson and Bhashyam Aiyangar, JJ. 2nd October 1902.</i>	}	<i>L. P. A. Nos. 9 and 10 of 1902.</i>
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Landlord and tenant—Remission at discretion—No legal obligation—Unenforceable character of the obligation.

The temple trustee who was the landlord sued for rent. The muchilika on which the suit was based was executed by the tenant to the Collector for the East India Company who was also the trustee of the temple to which Swamibhogam was to be paid. There was a clause in the muchilika which ran as follows: "if perhaps during any fusli loss be caused by an act of God, by flood, by drought, the same Thaladi thirwa and Thunduvaram shall be remitted by the Sircar * * * at their discretion." The clause evidently applied to Swamibhogam. The District Munsif himself exercised the discretion and remitted half the Swamibhogam, considering there was some loss of crop by *vis major*. On revision the Chief Justice held that the District Munsif was right and that the discretion to be exercised by the landlord was a *reasonable* discretion and *should* be exercised when there are sufficient reasons for the same. Hence the appeal under the Letters Patent.

Held that the words were not sufficient to create a legal obligation and could not be enforced by the courts just as the courts could not compel the Government to grant remission of revenue.

V. Krishnaswami Aiyar for appellant.

P. S. Sivaswami Aiyar for respondent.

Benson, and Bhashyam }
Aiyangar, JJ. } *Referred Case 9 of 1902.*
 2nd October 1902.

Contract Act, S. 25—Undertaking to pay another's debts out of charity—Relationship between parties—Enforceability of the undertaking.

Plaintiff and defendant were members of a joint Hindu family, but the family had no ancestral property. Plaintiff was trading in rice with money given to him from time to time by his brother, the defendant and another K. K. and defendant borrowed from the Commercial Bank some money to help the plaintiff with; and the debt due to the Commercial Bank was discharged by K. by means of a loan from the Purswalkam Fund. The debt due to the fund was discharged by K. At about the same time a release was given to the defendant by the plaintiff which recited that they had no ancestral property and went on in these terms.

"You (the defendant), have out of charity agreed to discharge the debts referred to in schedule B and * * * you yourself should discharge the debts referred to in schedule B. One of the debts in schedule B was the debt due to the P. Fund—(that which was due by K)."
 Plaintiff alleged that he paid the debt to K. and sued in the Small Cause Courts the defendant for payment to him of the same. The learned Judge held that the release was not supported by any valuable consideration but was supported by good consideration and that the debt was enforceable under S. 25 of the Contract Act.

Held :—That the defendant was legally bound to reimburse the plaintiff under the terms of the release deed to which he was a party; and that even assuming for argument's sake the defendant undertook to discharge plaintiffs' debts out of mere love and affection, the undertaking amounted to a legal obligation under S. 25 of the Contract Act, inasmuch as Exhibit A was in writing, and registered.

K. Narayana Rao for plaintiff.

P. R. Sundara Aiyar for defendant.

Davies and Bhashyam Aiyangar, JJ. } *G. M. P. 485 of 1902.*
 9th September 1902.

Review—Fresh evidence—Second appeal.

Where a second appeal is disposed of on the ground that there is no question of law, an application for review on the ground of the discovery of fresh evidence should be made to the lower appellate court.

Sætharama Naicker—petitioner, in person.

The Chief Justice and Moore, J. } *Referred Case 4 of 1902.*
 17th September 1902.

Legal Practitioners' Act—Professional misconduct—Anonymous letter to Revenue officer—Departmental inquiry—Suggestion of mode of inquiry.

Held :—Addressing an anonymous letter to a revenue officer holding a departmental inquiry into the conduct of a subordinate officer—the letter being calculated to influence the mode of inquiry is gross misconduct, and a vakil who is guilty of it may be dealt with under the Legal Practitioners' Act as for professional misconduct.

P. S. Sivaswami Aiyar for the Pleaders' Board.

C. Sankaran Nair and V. V. Srinivasa Aiyangar for the petitioner.

The Chief Justice and Moore, J. } *S. A. 665 of 1901.*

Civil Procedure Code, S. 317—Suit by real purchaser against trespassers—Certified purchaser made defendant—Admission by certified purchaser of purchase and possession by real purchaser.

Where the real purchaser in a court auction sale, in bringing a suit to recover the property from strangers, alleged that the property was purchased for him by another and made that other a party defendant to the suit, and that other admitted that the property was purchased for the plaintiff and was soon after put in his possession :—

Held, that the suit was not obnoxious to S. 317, C. P. C., and that the stranger defendants could not rely on S. 317 as a bar to the suit.

T. V. Seshagiri Aiyar for appellant.

K. Ramachandra Aiyar for respondent.

*The Chief Justice
and Moore, J.* } *S. A. 746 of 1901.*
26th September, 1902.

Civil Procedure Code, S. 13—Limitation—Suit by reversioner to set aside adoption—Other reversioners of the same degree barred—Suit, maintainability of—Prior decree in favour of both widow and adopted son in a suit for possession—Res judicata—No bar.

The fact that a suit by one of many presumptive reversioners to have an adoption made by the widow declared invalid has been dismissed as barred does not preclude another of them from obtaining a declaration to that effect if he is not barred under Art. 118 of the Limitation Act, *Bhagwanta v. Sukhi*, I. L. R., 22 A. 83, approved and *Ayyadorai Pillai v. Solai Ammal*, I. L. R., 24 M. 405, doubted.

Where the widow and the adopted son had sued the reversioner (who brought the present suit for declaration) for the recovery of property left by the deceased and he suffered a decree to be passed in the joint names of the plaintiffs without raising an issue or having it decided that the widow and not the adopted son was entitled to the properties:—

Held, that there was no implied adjudication of the validity of the adoption and that the suit for declaration was not barred.

V. Krishnaswami Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

Davies, J. } *C. B. P. 79 of 1902.*
19th September 1902.

Held, that where in an application for leave to sue as a pauper, the plaint on the face of it showed that the claim was barred by limitation, the court rightly refused leave to sue as a pauper.

K. R. Krishnaswami Iyengar for *T. P. Kothandarama Iyer* for petitioner.

P. S. Sivaswami Aiyar for respondent.

Davies, J. } *Cr. B. C. 428 of 1902.*
 19th September 1902.

Criminal Procedure Code, S. 488—Application for maintenance order—Subsisting decree of Civil Court granting maintenance.

Held, that an application for maintenance to a Magistrate under S. 488, Criminal Procedure Code, is not maintainable when there is already the decree of a Civil Court in favour of the applicant granting her maintenance.

H. Venkatramā Sarma for petitioner.

Davies, J. } *Cr. A. Nos. 545 to 547 of 1902.*
 19th September 1902.

Towns Nuisances Act, S. 5—Stopping of carriages on the highway—Nuisance.

Held, that in order to be a nuisance within the meaning of S. 5 of Towns Nuisances Act, it is necessary that actual obstruction to the thoroughfare should be caused by the detention of carriages, and in the absence of actual obstruction there is no ground for prosecution.

T. Rāngachariar for *The Acting Government Pleader* for the Crown.

Bhashyam Aiyangar }
and Moore, JJ. } *S. A. Nos. 77 and 78 of 1901.*
 29th September 1902.

Suit by one of two uralans without joining the co-uralan as plaintiff, maintainability of—Suit indirectly impeaching act of co-uralan.

Plaintiff as uralan of a Devaswom sued defendants 1 to 18 for the recovery of certain items of immoveable property demised to them on kanom in 1880 by the then Samoodayom of the Devaswom and subsequently renewed by the 19th defendant—the only other co-uralan—without the consent of the plaintiff. On objection being taken that the plaintiff by himself without joining the 19th defendant as co-plaintiff was not entitled to sue, the District Judge held that as the 19th defendant had all along been acting adversely to the interests of the Devaswom, it would not have been possible to institute the suit with the 19th defendant as a co-plaintiff. On second appeal:—

Held, that the suit was maintainable by one uralan alone, especially, as the suit was indirectly to impeach the act of the co-uralan.

In the goods of A. S. Gubboy, I. L. R., 26 C. 408; *Biri Sing v. Nawal Singh*, I. L. R., 24 A. 226, approved.

J. L. Rosario for appellant.

P. R. Sundara Aiyar and *K. P. Govinda Menon* for respondent.

Bhashyam Aiyangar and *Moore, JJ.* } *S. A. No. 1266—1300 of 1901.*
29th September 1902.

Limitation—Computation of time—Exclusion of holiday notified as such.

The suit was for enforcement of acceptance of patta under the Rent Recovery Act. The last day of the period for filing the suit was a Sunday. The next day happened to be a general holiday for *Srijayanti*. The holiday was notified as such in the District Gazette of Tanjore within which District the court in which the suit had to be filed was situate. The plaint was eventually presented on the next following day. The Sub-Collector dismissed the suit as barred by limitation, holding that there was nothing to prevent the parties from filing the suit on the previous day when he did attend office and worked, though the same was a holiday. The District Judge confirmed the Sub-Collector's order. On second appeal :—

Held, the day having been notified to be a holiday, should have been excluded in the computation of time for purposes of limitation and that the fact that the Judge worked or attended the court could make no difference.

O. Ramachandra Rao Saheb, V. Krishnaswami Aiyar and *A. S. Balasubrahmanya Aiyar* for appellant.

Joseph Satya Nadar for respondents.

Benson and *Bhashyam Aiyangar, JJ.* } *A. 48 of 1901.*
21st October 1902.

The suit was for money due on a hypothecation bond executed by one of two co-widows in 1886 against the 1st defendant, the other widow, who alone was surviving at the time of the suit and against defendants 2 to 3 to whom the 1st defendant had relinquished her interest in the estate of her husband. Evidence was adduced to show that the widows lived together as one family though

quarrelling with each other now and then and that the executant of the document was looking after the estate at the time of the execution. The 3rd defendant was the adopted son of the 2nd defendant and the relinquishment was in favour of both the 2nd and the 3rd defendants and the properties were enjoyed by both the 2nd and the 3rd defendants jointly. A decree was passed by the Sub-Judge against the property in the hands of defendants 2 and 3. The 3rd defendant alone appealed. A preliminary objection was taken that the appeal was not maintainable by the 3rd defendant alone as he was not the next reversioner entitled to the estate.

Held overruling the objection:—That as the relinquishment was in favour of the 2nd and 3rd defendants jointly, the 3rd defendant was competent to appeal under S. 544, C. P. C.

Held also that the debt was binding upon the 1st defendant. I. L. R. 16 M., 1 distinguished, 3 M. H. C. R. 424 referred to.

C. Sankara Nair and V. Sankaranarayana Sastri for appellants.

V. Krishnaswami Aiyar and T. Rangachariar for respondents.

Subrahmanya Aiyar and Davies, JJ. } *S. A. 1861 of 1901.*
 21st October 1902.

Where a patta provided for a remission of a certain amount out of the faisal tirva and contained the following terms "so long as the lands are in the possession of yourself, your daughters**and the descendants of these, remission shall hold good. In case the lands are transferred from the descendants of the said individuals and be in the possession of others, the full amount will be levied." On objection being taken that the provision was a term of the lease and as such was inoperative without registration under S. 17(d) Registration Act.

Held that the provision was not a term of the lease but merely a memorandum of agreement and, therefore, required no registration.

T. Ranga Chariar for appellant.

T. Subrahmanya Aiyar for respondent.

NOTES OF RECENT CASES.

Benson, J.
Bhashyam Aiyangar, J. } *S. A. 669 of 1901.*
1902, October 23.

Attachment—Sale—Cancellation of sale—Revival of attachment—Waiver.

Where an item of property is attached at the instance of various judgment-creditors of the owner and sold, the sale is free of all the attachments; but if the sale is subsequently cancelled under S. 310A by payment of the amount mentioned in the proclamation of sale (*i. e.*, the amount due to the decree-holder conducting the execution), then the attachments of the other decree-holders revive and have the same effect as regards alienations as if the attachments had always continued on the property.

A subsequent application for attachment by the decree-holder who had already attached does not amount to a waiver of the benefit of the earlier attachment, especially where the petition referred to it and prayed for a fresh attachment only if the court thought that the earlier one was not in force.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Boddam, J.
Bhashyam Aiyangar, J. } *S. A. 1243 of 1901.*
1902, July 24.

Res judicata—Co-defendants—Prior mortgagees impleaded as defendants in the suit by another mortgagee.

Where a mortgagee admits that two defendants have prior mortgages and sues for sale of the mortgaged properties subject to their rights, the two defendants are not called upon to settle each other's respective rights in that suit. When each finds his prior right recognised, he need not complain that some other person who

has no right has been also recognised as having some right. In a subsequent dispute between the defendants *inter se*, there is, therefore, no *res judicata* as to the genuineness, validity or amount of the mortgages.

K. Ramachandra Aiyar for appellants.

P. S. Sivaswami Aiyar for respondent.

<i>Davies, J.</i> <i>Bhashyam Aiyangar, J.</i> 1902, September 23.	}	<i>S. A. 1331 of 1901.</i>
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Rent Recovery Act—Patta—Impropriety of patta—Patta accepted for a long time—Estoppel.

Where a patta which is improper in some respects has been, without objection, accepted by the tenant for a number of faslis, he cannot for the first time in a later fasli spring an objection to the propriety of the patta and so defeat the landlord's just claim for rent. The tenant is not for ever estopped from questioning improprieties in such a patta; but he must at the beginning of the fasli give notice to the landlord that the patta is improper in such and such respects and that a proper patta should be given. If he does not do this, he is for that fasli precluded from raising the objection.

The landlord had been for years tendering two pattas to the tenant, one for the first crop and another for the second. The tenant had never objected. For the first time in the plaint fasli the tenant took the objection. The court while holding that the whole of the terms of the tenancy should be contained in one patta and that the tender of two pattas was irregular, decided that as the tenant had acquiesced in separate pattas, he could not object to them unless at the beginning of the fasli he had demanded a single patta containing all the terms of the tenancy.

J. L. Rosario for appellant.

P. S. Sivaswami Aiyar for respondent.

Subrahmania Aiyar, J.
Davies, J.
 1902, October 27.

} *C. M. A. 62 of 1902.*

Joint landlords—Tender and execution of patta—Duty to join—Neglect by one—Liability for damages.

Two joint landlords who cannot separately tender pattas to their common tenants owe a duty to each other to join in executing a patta, until they partition the lands. Any loss which one landlord has sustained by the other wilfully refusing to join in executing the patta is recoverable as for a breach of an express or implied contract.

P. R. Sundara Aiyar for appellants.

P. S. Sivaswami Aiyar for respondent.

Subrahmania Aiyar, J.
Davies, J.
 1902, October 28.

} *C. M. A. No. 6 of 1902.*

Several reversioners of equal degree—Trespass—Suit by one for his share.

One of several reversioners who jointly inherit to a deceased Hindu may maintain a suit against a trespasser in possession for his share of the heritage without making the others parties.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Subrahmania Aiyar, J.
Benson, J.
Bhashyam Aiyangar, J.
 1902, November 4.

} *O. S. A. No. 11 of 1902.*

Probate—Caveat—Interest of Caveator.

Where a testator left his properties to his widow by a will which declared that "his wife Jiyaratnammal shall take his properties and no others shall have any manner of right to the same," it was held that the will gave her no more than a widow's estate

which she would have taken without the will and that, therefore the reversioners to his estate (his father and brother) had no "interest" to put in a caveat against an application for probate by the executor of the will.

When it was suggested that as the parties were residents of French India, the widow might take an absolute estate even without the will, it was held that whether she took an absolute or limited estate according to the law of intestate succession, in either case the caveators had no *locus standi* to impeach the will as it did not affect their rights if they had any according to such law.

S. 82 of the Indian Succession Act which has been made applicable to Hindu Wills falling within the Hindu Wills Act does not affect the rule of construction well-established in regard to bequests to wives that, in the absence of clear evidence to the contrary, the presumption is that a limited estate only is intended.

P. B. Sundara Aiyar for appellant.

P. S. Sivaswami Aiyar for respondent.

<i>Benson, J.</i> <i>Bhashyam Aiyangar, J.</i> <i>Moore, J.</i> 1902, October 3.	}	<i>Appeal No. 52 of 1902.</i>
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Limitation Act, Arts. 118 and 119—Declaratory suit—Suit for possession.

Held (by *Benson & Moore, JJ. Bhashyam Aiyangar, J.* dissenting) that Articles 118 and 119 of the Limitation Act are not confined to suits involving only declaratory conclusions but are also applicable to suits for possession which necessarily involve the granting of declarations.

Parvati v. Saminatha, I. L. R., 20 M. 40 and Shrinivas v. Hanmant, I. L. R., 24 B. 260 approved.

Shadagopachariar for appellant.

P. S. Sivaswami Aiyar for respondent.

Subrahmania Aiyar, J. }
 Benson, J. } A. S. No. 891 of 1901.
 1902, November 7.

Limitation—Revenue sale—Title not complete until confirmation—Suit to set aside—Cause of action—Six months—Date of confirmation.

A sale under the Revenue Recovery Act II of 1864 is not complete till it is confirmed by the Collector. The owner of properties sold for arrears of revenue is therefore aggrieved within the meaning of S. 59 of the Act only by confirmation, and his cause of action to sue in the Civil Court to have the sale set aside arises on the date of such confirmation.

Where, therefore, a Deputy Collector cancelled a sale, but on appeal the Collector reversed the order and confirmed the sale it was held that a suit brought within six months of the confirmation by the Collector, though not within six months of the sale, was in time.

K. Srinivasaiyengar for appellant.

R. Kuppusami Aiyar for respondent.

Subrahmania Aiyar, J. }
 Benson, J. } S. A. No. 913 of 1901.
 1902, November 7.

Vendor and Vendee—Suit for possession—Dismissal—Suit for damages—Suit of small cause nature—Civil Procedure Code, S. 886.

Where the vendee who was put in possession of properties sold was subsequently dispossessed by a stranger, and a suit by the vendee against the stranger failed on the finding that such stranger was the owner, a suit for damages against the vendor for breach of covenant to secure quiet enjoyment was held to be cognisable by a Court of Small Causes; and it was also held that an alternative prayer to direct the defendant (who was not in possession) "to place him in possession," which was or must have been known to have been a futile prayer would not take it out of the category of cases cognisable by a Court of Small Causes.

Held, therefore, that the suit was substantially for damages and that no second appeal lay.

K. Ramachandraiyyar for appellant.

A. S. Balasubrahmaniam Aiyar for respondent.

<i>The Chief Justice.</i> <i>Bhashyam Aiyangar, J.</i> 1902, November 7.	}	<i>C. M. A. No. 82 of 1902.</i>
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Civil Procedure Code, S. 493—Temporary injunction, disobedience of—Contempt—District Court, powers of—Court acting suo motu.

The plaintiff obtained a temporary injunction restraining the defendants from harvesting the crops standing on the suit lands. The defendants disobeyed the injunction of the court by cutting and carrying away the crops. The District Judge acting *suo motu*, issued a notice under S. 493, C. P. C., to the defendants to show cause why they should not be committed for contempt and ultimately directed that each of the defendants be imprisoned for a period of three months. He purported to pass the sentence under what he considered to be the inherent powers possessed by him as a District Court. It appeared also that the final order was passed not on the application of the aggrieved party though he interested himself in the proceedings.

Held, that the District Court not being a Court of Record had no inherent power to punish for contempt out of court.

Held also, that the court should be set in motion to enable it to proceed under S. 493, C. P. C., by some aggrieved party and should not act *suo motu*.

C. Krishnan and K. N. Aiyar for appellants.

K. Narayana Rao for respondent.

Subrahmanya Aiyar, J.
 Benson, J. } S. A. No. 894 of 1901.
 1902, November 7.

Suit for declaration of title—Plaintiff trespasser as to part of property—No declaration—Declaratory relief discretionary.

Plaintiff brought a suit for declaration of title and for an injunction restraining the defendants from pulling down a shed which he had put up on the site. The lower Courts found that he was entitled only to a portion of the plot and as to the remainder that he had no title and was a trespasser, and dismissed the whole suit.

Held, that under the circumstances of the case a declaration of plaintiff's title being only a discretionary relief, should not be made even as to the portion of the land found to belong to him.

P. S. Sivaswami Aiyar and C. V. Ananthakrishna Aiyar for appellant.

K. P. Govinda Menon for respondent.

The Chief Justice.
 Bhashyam Aiyangar, J. } C. M. A. Nos. 77 and 78 of
 1902, November 7. } 1902.

Guardian and Wards Act—Guardianship of a Hindu widow—Right of natural father of husband adopted into another family.

Held, that the natural father of a Hindu widow's husband loses his preferential right to be appointed guardian of the minor widow by the fact of her husband's adoption into another family. His right, if any, is not superior to that of the widow's father.

C. R. Tiruvenkata Chariar for appellant.

S. Subbaiya Chetti for respondent.

The Chief Justice.
Bhashyam Aiyangar, J. } C. M. A. Nos. 65 & 66 of 1902.
 1902, November 7.

Succession Certificate Act—Right of blind senior Anandavan.

Held, (1) A Karnavan by reason of his blindness does not *ipso facto* become disentitled to a succession certificate to the assets of the tarwad on the death of the previous Karnavan.

(2). That the question whether he is qualified to be a Karnavan cannot be decided in a summary proceeding under the Succession Certificate Act.

C. V. Ananthakrishna Aiyar for appellant.

C. Sankara Nair and V. Ryru Nambiar for respondent.

Subrahmaniya Aiyar, J. } *Small Cause Reference No. 7 of*
Davies, J. } 1902.
 1902, October 27.

The plaintiff sued to recover from the defendant moneys advanced to the executors in charge of the estate during the minority of the defendant.

The plaintiff stated that the moneys were advanced for the benefit of the estate *bona fide* and after inquiry.

The Small Cause Judge who tried the suit referred the following questions for the opinion of the High Court :—

1. Whether in the absence of a specific charge, the estate of the defendant is liable to satisfy the debts incurred during his minority by the executors under his father's will, who were also appointed by the same will his guardian and the manager of the estate.

2. Whether part-payments made by the defendant to the plaintiff after he attained his majority with means of knowledge as to whether the debts were necessary or not, do not amount to a valid ratification of the guardian's act.

Held, that the minor was not liable and that the part-payment by the minor in discharge of the debts did not amount to a ratification.

P. R. Sundara Aiyar for the debtor.

K. Narayana Rao for the creditor.

Benson, J.
Bhashyam Aiyangar, J. } S. A. No. 948 of 1901.
 1902, November 20.

Cess—Tirupani cess—Payment for a long time—Implied Contract—Contract not enforceable by law.

Held:—That payment of a cess called "*Tirupani cess*," though proved to have been paid by the tenant for a number of years, being in its nature voluntary, will not support the inference of an implied agreement to pay the same enforceable at law.

K. Ramachandra Aiyar for appellant.

K. P. Govinda Menon for respondent.

["*Tirupani cess*," in this case was levied for the purpose of repairing certain charitable buildings].

Subrahmania Aiyar }
and Davies, JJ. } S. A. No. 984 of 1899.
 1902, October 20.

Right of suit—Agent suing in his own name—Malabar Law—Stanom.

The plaintiff (Krishnan Raja) who was the senior member of a Tavazhi of Pudia Kovilagam (of the Zamorin's family), attained the stanom of the 4th Rajah of Calicut. He was, however, allowed to manage the affairs of the Tavazhi, and was given full power to represent it, by a karar executed by all the members thereof. The plaintiff instituted in his own name the present suit to recover the Tavazhi immoveable property from a tenant. The tenant disputed the plaintiff's right to sue.

Held, dismissing the second appeal,

(1) that the plaintiff was only appointed *agent* of the Tavazhi, and that a mere agent cannot conduct suits in his own name, and

(2) that the plaintiff, by attaining the *stanom*, ceased to be a member of the Tavazhi, and consequently the contention that under the Karar the plaintiff was constituted *Karnavan* of the Tavazhi, who could sue in his own name on behalf of Tavazhi, should be overruled.

C. Sankaran Nair and M. Bhaskara Menon, for appellant.

C. V. Anantakrishna Aiyar for respondent.

Benson, J.
Bhashyam Aiyangar, J. } S. A. No. 719 of 1901.
 1902, October 22.

Civil Procedure Code, S. 586—Suit of nature cognisable by Courts of Small Causes—Declaration.

Where the substantial prayer in a suit is cognisable by a Court of Small Causes, the mere addition of an incidental prayer for declaration will not take it out of that category.

Held, accordingly, that no second appeal lay in a suit for rent, though an ancillary declaration that the land was *nunja* was also prayed for.

P. S. Sivaswami Aiyar for appellant.

Rangaramanujachariar for respondent.

Subrahmaniam Aiyar and
 Davies, JJ. } S. A. 1004 of 1901.
 1902, November 25.

Hindu Law—Death of undivided member leaving daughter—Survivor's liability to pay expenses of marriage.

A member of an undivided family who takes properties by survivorship on the death of an undivided member is bound to defray the expenses of his daughter's marriage. And such expenses include the customary presents made at the time of the *Graha-pravesam* and *Ritusanti* (*nuptials*) which originally formed and must still be considered to form an integral part of the ceremony of marriage.

Expenses of *Dipavali*, *Kartigai* and *Ritusnanam* which though customary are not obligatory ceremonies and form no part of marriage need not be paid.

The mother of the girl who is interested in her marriage may expend the money and recover it from such surviving member under S. 69 of the Contract Act. See *Vaikuntam Ammangar v. Kallapiran Ayyangar*, I. L. R., 23 M. 512.

T. R. Venkataramasastry for appellant.

A. K. Sundaram Aiyar for respondent.

NOTES OF RECENT CASES.

Benson
and
Bhashyam Aiyangar, JJ.
1902, November 24.

} S. A. No. 1077 of 1901.

Contract Act, S. 74—Penal rate from date of default—No interest before the date of default—Enforceability.

The plaintiff and the 5th defendant were joint stake-holders of a lottery. First defendant held a share and obtained a prize of 30 cottas of paddy in the first drawing, and executed a bond by which he undertook to deliver 27 cottas of paddy in half-yearly instalments of 3 cottas each. The 1st defendant paid only for 3 instalments and neglected to pay the rest. The bond also provided that the 1st defendant will be liable to deliver at once the whole balance of the debt with interest at $\frac{1}{8}$ per cotta (1 anna per Rupee) per diem from date of default. The District Munsif gave a decree for the whole amount claimed. But the District Judge held that the provision in the bond as to interest, though neither unfair nor unconscionable was yet unenforceable as being exorbitant and penal, and allowed only 50 per cent interest. On second appeal.

Held:—That the contract rate should be enforced.

V. C. Desikachariar for appellant.

B. Panchapagesa Sastri for respondent.

Benson
and
Bhashyam Aiyangar, JJ.
1902, November 25.

} S. A. No. 1139 of 1902.

Rent Recovery Act, Ss. 2 and 42—Undertaking to pay Government revenue to a private individual—Rent—Public revenue—Exchange of patta and muchilika, necessity for—Limitation Act, Arts. 110 and 120—No cause of action against tenants—Purchaser at revenue sale, liability of—Mortgagee with possession, liability of.

The plaintiffs were the trustees of a certain mutt. The Government was paying a Mohinee allowance (annual cash payments)

to plaintiffs for the purposes of a mutt prior to 1863. In 1863 the ancestor of defendants 1 to 4 who owned certain lands as ryotwari land-holder undertook by executing a muchilika to Government to pay the first crop assessment due on his lands to the plaintiffs' mutt in lieu of the Mohinee allowance they were receiving from Government. From 1863 to 1893 the defendants were duly paying the amount due to the mutt in virtue of this arrangement. The plaintiffs brought this suit for the money due on account of Faslis 1303 to 1306. Defendants 6—16 were impleaded as they were in possession and enjoyment of portions of land on which the sum was assessed, the 9th as purchaser at a revenue sale held for default in paying the second crop assessment by defendants 1 to 4 and the 11th as mortgagee and the rest as vendees. The Munsif gave a decree for a portion of the amount claimed against defendants 1 and 4 and held that the money due to the plaintiffs was rent, and as such exchange of patta and muchilika was necessary and that the period of limitation within which a suit should be brought would be 3 years according to Art. 110 of the Limitation Act. There was no decree against defendants 6 to 16 as there was no exchange of patta and muchilika, though defendants 1 to 4 were made liable, they having been taken by the Munsif to have waived their right by long acquiescence. The Munsif also held that the payment being only in the nature of rent, it cannot be made a charge upon the land. Plaintiffs appealed. The Sub-Judge in modification of the Munsif's decree gave a decree for the whole amount against all defendants. In second appeal,

Held:—1. That as the plaintiffs were not inamdars, and the payment to them was not one of rent the Rent Recovery Act did not apply.

2. That the payment not being one of rent, Art. 110 of Sch. II of the Limitation Act did not apply, but Art. 120.

3. That the amount could be realized from the holders of the land for the time being.

4. That public revenue when made payable to a private individual instead of to Government ceased to be public revenue and therefore Ss. 2 and 42 of Act II of 1864 were not applicable and that, consequently, the amount was not a charge upon the land.

5. That plaintiffs had no cause of action against defendants as there was no evidence of assignment by Government but only a muchilika executed to Government by the landholder.

6. That the purchaser at a revenue sale could not be held liable for the dues payable before the sale.

7. That a mortgagee in possession is not liable for the payment.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for *V. Krishnaswami Aiyar* for respondent.

V. Ramesam for 5th defendant.

Benson
and
Bhashyam Aiyangar, J.J. } *S. A. Nos. 1137, & 1138 of 1900.*
1902, November 25.

Malicious prosecution—Suit for damages—Reasonable and probable cause—Conviction by first Court set aside on appeal. Factum of conviction by one Court—Inference of reasonable and probable cause.

In a suit for damages for malicious prosecution, it was found as a fact that there were malice and want of reasonable and probable cause on the part of the defendant in instituting the prosecution.

In Second Appeal it was contended that the fact that the plaintiff was convicted by one Court is conclusive proof of reasonable and probable cause.

Held, that there was no such presumption. *Jadubdar Singh v. Sheo Saran Singh*, I. L. R., 21 A. 26 and *Bapirazu v. Chinna Venkayya*, 3 M. H. C. R., 238 dissented from.

N. T. Shamanna for appellant.

D. Chamier for respondent.

Benson
 and
Bhashyam Aiyangar, JJ. } S. A. 119 of 1901.
 1902, December 1.

*Suit for damages for malicious prosecution—Decree—Appeal
 —Death of appellant defendant—Abatement of suit.*

The suit was for damages for malicious prosecution and a decree was passed awarding damages to the plaintiff. On appeal the decree was confirmed. The defendant preferred a second appeal and pending the same died. His son had himself brought on the record as the legal representative of the defendant and wished to proceed with the appeal. A preliminary objection was taken on behalf of the respondent that as the cause of action abated, the appeal too abated and that consequently the son of the defendant could not prosecute the appeal.

Held, overruling the objection, that the cause of action became merged in the decree and that the legal representative of the defendant is competent to prosecute the appeal against the decree which may be executed against the estate.

Opinion of the majority in *Gopal v. Ramchandra*, I. L. R., 26 B. 597 followed.

P. R. Sundara Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

Subrahmaniam Aiyar
 and
Davies, JJ. } S. A. 926 of 1901.
 1902, December 4.

Suit by de facto manager and priest—Joinder of Lessor and lessee as plaintiff.

The suit was by the incumbent of a Church in a village in the District of Trichinopoly for an injunction restraining the defendants (ryots of the neighbouring village) from enhancing the capacity of their tank so as to flood the lands attached to the

Church and managed by the 1st plaintiff. The 2nd plaintiff was a lessee under the first. It was contended for the appellants (defendants) that the suit was not maintainable by the 1st plaintiff and also that the suit was bad for misjoinder of the 2nd plaintiff.

Held, that the 1st plaintiff who was in possession of the lands and who was *de facto* Manager of the Church was competent to institute the suit, though he was subject to the superintendence of Ecclesiastics of higher grade in matters of alienation &c.

Held also that the joinder of the lessee was proper.

V. C. Desikachariar for appellant.

P. R. Sundara Aiyar for respondent.

<i>Benson</i> and <i>Bhashyam Aiyangar, JJ.</i> 1902, December 5.	}	A. 86 of 1901.
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Negotiable Instruments Act, Ss. 94 and 106—Hundis—Absolute or conditional payment—Presumption—Suit on original cause of action—Notice of dishonor, requisites of—Waiver or dispensation of notice—Pleading.

Plaintiff sued the defendants for a sum due upon accounts. Defendant pleaded that he gave plaintiff 4 hundis in discharge of a major portion of the debt, that the suit in so far as it covered the amount of the hundis as framed on the original debt was bad but should have been brought on the hundis; and that he was not liable to the extent of the amount covered by the hundis as the same were given at 2½ per cent. discount on the agreement that the plaintiff should take them as absolute payment and also that no notice of dishonour was given to him as required by the Act. The Subordinate Judge disbelieved the defendant's allegations and granted a decree to the plaintiff. As to the want of proper notice of dishonor he said that the Negotiable Instruments Act was not strictly applicable to hundis.

Held.—(1) that in law the presumption is that Bills and Notes are given only as conditional payment ;

In re Romer and Haslam, 1893, 2 Q. B. 286 followed ;

(1) that therefore the suit on the original cause of action was badly framed ;

(2) that negotiation *per se* is no evidence of absolute payment ;

(3) that notice of dishonor should intimate that the person to whom it is given will be held liable ;

(4) that in the absence of the necessary averments in the plaint or of an issue, a plea of waiver of notice will not be allowed to be raised ;

(5) that the Negotiable Instruments Act is strictly applicable to hundis in the absence of any local usage to the contrary ;

(6) that where a bill or note is given in absolute discharge of a prior debt no suit will lie on the original cause of action.

V. Krishnaswami Aiyar for appellants.

S. Srinivasa Aiyar for 1st appellant.

P. S. Sivaswami Aiyar for respondent.

<i>Benson</i> and <i>Bhashyam Aiyangar, JJ.</i> 1902, December 8.	}	<i>C. M. A. 13 & 14 of 1902.</i>
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Civil Procedure Code, S. 244—Objection by legal representative brought on record that attached property was not Judgment-debtor's—No separate suit.

A money decree was obtained by the respondent, a junior member of a joint Hindu family. The judgment-debtor died

and the appellant was brought on the record as the legal representative of the deceased judgment-debtor. The legal representative objected to the attachment of certain properties under S. 278 on the ground that the properties were not the assets of the judgment-debtor in his hands. The Sub-Judge disallowed the objection. Hence the appeal.

A preliminary objection was taken on behalf of the respondent that the proper course for the appellant was to bring a regular suit and that the matter was not a matter falling under S. 244 and that therefore he had no right of appeal.

Held, overruling the preliminary objection, that the matter was one under S. 244 and that it can be and ought to be decided under that section and not by a separate suit.

J. L. Rosario for appellant.

V. Ryrn Nambiar for respondent.

<i>Full Bench.</i> <i>Subrahmaniam Aiyar,</i> <i>Davies</i> <i>and</i> <i>Benson, JJ.</i> 1902, December 11.	}	<i>Cr. Rev. Case 78 of 1902.</i>
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Penal Code, Ss. 375, 424—Removal of crops by a tenant—Sharing system—Theft—Dishonest intention.

A tenant in a Zemindary village wherein the landlord and tenant were to share the produce of the land after the harvesting of the same carried away the crops to his own house without giving the share of the Zemindar to him. The Magistrate convicted the tenant of theft.

In revision it was contended for the tenant that the Zemindar had no property at all in the crops and much less possession of it and therefore the act would not constitute any offence.

Held, (1) that the possession of the crop was with the tenant till delivery and that a removal of the crops before delivery will not constitute theft. If the removal was dishonest the act will constitute an offence under S. 424, I. P. C., and

(2) that a *bona-fide* removal of the crops for the purpose of averting loss will not be a dishonest removal.

T. Rangachariar for petitioner.

<i>The Chief Justice</i> and <i>Bhashyam Aiyangar, J.</i> 1902, December 11.	}	<i>C. M. S. A. 25 of 1902.</i>
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Civil Procedure Code, S. 244—Exonerated defendant—Parties to suit—Burden of proving that attached property belongs to Judgment-debtor.

Plaintiff brought a suit against all the members of a tarwad and obtained a decree against defendants 1 to 3. The other defendants were exonerated. In execution of the decree plaintiff attached certain properties standing in the names of defendants 2 and 3. 6th defendant, against whom no decree was passed, put in a claim petition to the effect that the properties belonged to the tarwad and not to defendants 2 and 3 alone. The District Munsif disallowed the claim petition on the ground that, in his opinion, the properties were gifted to defendants 2 and 3 and were, therefore, theirs.

On appeal, the Sub-Judge held that the burden of proving that the properties belonged to the judgment-debtors lay upon the execution-creditor and that he had not discharged the same.

The execution-creditor preferred a second appeal and contended that there was no appeal to the Sub-Judge from the District Munsif's order, and that S. 245 did not apply to the case as the 6th defendant, the petitioner, was exonerated from the decree and, therefore, no party to the suit. *Chowdry Wahed Ali v. Mussamut Jamaee*, 11 B. L. R., 149 relied upon.

Held, that S. 244 applied to the case and, therefore, an appeal lay.

Ramaswami Sastrulu v. Kameswaramma, I. L. R., 23 M. 361 followed.

Also that there is no conflict between 11 B.L. R., 149 and I. L. R., 23 M. 861.

That the onus of proving that the property belonged to the judgment-debtor lay upon the execution-creditor.

T. R. Ramachandra Aiyar for appellant.

C. Sankaran Nair for respondent.

Full Bench.

Subrahmanya Aiyar,

Davies,

and

Benson, JJ.

1902, December 12.

C. R. P. 188 of 1902.

Limitation Act, Arts. 57 and 120—Suit for sale of pledge—Contract Act, S. 176.

A pledgee brought a suit for sale of the pledge with a view to recover the amount of the pledge. The District Munsif dismissed the suit as barred by limitation, the same having been brought more than three years, though before six years, from the date of the pledge. It was contended on behalf of the appellant that the right to recover the money personally was distinct from the right to proceed on the security, and that the latter was not ancillary to the former, but a distinct and separate right and that therefore Art. 120 and not Art. 57 applied.

Held, by the majority (*Subrahmanya Aiyar* and *Benson, JJ.*) that the proper article applicable to a suit for sale of the pledge is Art. 120.

And that the article applicable to a suit to obtain a personal decree is Art. 57.

Vitla v. Kalekara I. L. R., 11 M. 153 overruled.

Pertap Udai Nath Sahi Deo v. Moti Das I. L. R., 22 C. 112 followed

Davies, J.—The right to sell the pledge privately being given expressly by S. 176 of the Contract Act, no suit for sale of the same is maintainable, in which view no question of limitation arises.

R. Subramanya Aiyar for petitioner.

K. Ramachandra Aiyar for respondent.

Full Bench.
Subrahmania Aiyar,
Davies,
 and
Benson, JJ.
 1902, December 12.

S. A. 945 of 1901.

Hindu Law—Partition—Concealment by father of certain debts due to the family, consequences of—Is father entitled to a share in such properties ?

Where a Hindu father concealed certain debt bonds in a partition effected between him and his sons, and afterwards when the concealment was discovered, the father claimed a share in them:—

Held, he was not disqualified from sharing in them by reason of the concealment.

R. Sivarama Aiyar for appellant.

A. K. Sundara Aiyar for respondent.

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Appeal:—See Civil Procedure Code

—See Letters Patent.

Cause of Action—*Joinder—Jurisdiction.*

Two or more causes of action to recover money may be joined, but only if they arose within the jurisdiction of the court in which the suit is brought.

Ethirajulu v. Sreeramulu... 11

Burden of Proof in a suit for contribution —See Contribution.

Civil Procedure Code, Ss. 244, 318 and 335—*Mortgage decree—Purchase—Suit on a subsequent mortgage—Sale subject to prior charge—Purchase—Obstruction to possession—Claim allowed—Appeal—Matter relating to execution—Private purchase from mortgagor after decree for sale—Obstruction—No appeal*

An order determining the right to possession of properties as between the mortgagee-decree-holder-purchaser and a party to the suit, is an order passed in execution between the parties to the suit within the meaning of section 244, C. P. C., and hence an appeal will lie against such an order.

A similar order as between the decree-holder-purchaser and one who had purchased the property from the mortgagor-judgment-debtor after the decree for sale is not an order between parties to the suit or their representatives within the meaning of S 244, C. P. C., and hence no appeal lies against such an order.

Where in a decree for sale upon a mortgage, the rights of purchasers in execution of a decree for sale upon a prior mortgage were reserved and properties were sold subject to a charge in their favour —

Held, that upon the proper construction of the decree the prior purchasers were entitled to remain in possession until redeemed and that the subsequent purchaser was not entitled to recover the properties from them without paying the amount of the charge in their favour

Kasina'ha Aiyar v. Uthumansa Rowthen... 1

Contribution—*Joint decree—Payment by one—Contribution claimed against the other—Liability—Burden of Proof*

Where one of two judgment-debtors against whom a joint decree for money was passed satisfied the whole decree, there is *prima facie* a right to contribution. It is for the defendant to show that as between the plaintiff and the defendant, the plaintiff should bear the whole debt or that the defendant was not equally liable with the plaintiff or that they were joint tortfeasors in such a sense as would negative the right to contribution.

Sivada Panda v. Jujisti Panda... 13

Execution—Application for execution—Fresh application—Continuation—Petition struck off—Res judicata—Order based on two adjudications—Judicial Act—Presumption—Question of irregularity raised on appeal—Transferee-decree-holder—Application—Forum—Representatives of judgment-debtor—Powers of executing Court.

An application for execution of a decree by a sale of properties already attached in pursuance of a prior application not legally disposed of may be treated as one to continue such prior execution proceedings. But in so far as the later application asks for execution by attachment and sale of properties not comprised in the earlier one, such application must be treated as a fresh one and cannot be a continuation of the earlier execution proceedings.

The dismissal of a suit or an execution application based upon an adjudication as to a right claimed is *res judicata* as to such right and the fact that the dismissal is based upon another ground also does not make it any the less *res judicata*.

An application in execution will be pending until it is validly disposed of; and striking an application off the file is no valid disposal of it.

Where for the first time on appeal an objection was taken that the transferee-decree-holder had not been brought on record by order of the Court which passed the decree, and there was no evidence to show that such was the case:—

Held, that *omnia præsumuntur rite esse acta* and that the objection could not be taken in appeal as no opportunity had been given to the other party in the lower court to show that the formalities had been complied with.

As to whether the application to bring the transferee-decree-holder on record should be made to the Court which passed the decree:—*Quære*.

Held, that the representatives of a judgment-debtor who as such representatives had been parties to various proceedings in execution, were estopped from objecting to the validity of execution on the ground that they had not been formally brought on record as such representatives.

Where in addition to a copy of the decree a prior order granting execution by attachment of lands was also transmitted to another Court for execution, under clause (c) of section 224, C. P. C.:—

Held, that the executing court had power to do all acts necessary to give effect to the order granting execution, including the bringing in of the representatives of the judgment-debtor if the judgment-debtor should die before the sale.

But as to whether a court to which a decree alone has been sent for execution could proceed against the representatives of judgment-debtor without an order therefor from the court which passed the decree *Quære*.

Venkatappiah v. Jagannadha Rao

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Execution, matter relating to:—See Civil Procedure Code.

Hindu Law—*Widow—Husband's estate—Income—Accretion—Ownership of widow—Presumption—No difference in enjoyment of purchased land and widow's estate.*

There is no presumption that a widow intends to incorporate the unspent income of her husband's estate or the property purchased therewith with that estate. In the absence of evidence to the contrary, the widow's absolute right to the income or the property and the consequent power of alienation must prevail.

Akkanna v. Venkiah 5

Incomplete instrument:—See Mortgage.

Judgment—See Letters Patent.

Jurisdiction:—See Cause of action.

Letters Patent—*Security, refusal to receive—Judgment—Appeal—No time fixed for furnishing Security.*

An order refusing to receive security for costs directed to be furnished is, within the meaning of S. 15 of the Letters Patent, a judgment and an appeal lies against such order.

Where an order directing the appellant to furnish security for the costs of respondent did not specify a day within which to furnish the security and the court afterwards refused to receive the security furnished, it was held that the order was wrong, and the appellants were directed to furnish security within a specified day.

Thirtha Swami v. Thirtha Swami 34

Mortgage—*Document intended to be executed by many—Execution by some—Refusal of others—Compulsory registration—Validity of Mortgage against executants—Proposal—Incomplete instrument—Intention of parties.* ...

Where a document intended to be executed by more than one person is executed by one or some only others refuse to complete it, the question whether it is binding on those who have executed it is one of the intention of the parties to be gathered from the facts of each case.

Three undivided brothers in a Hindu family and the minor son of the eldest brother were the intended executants of a mortgage instrument. The eldest brother alone signed for himself and his son. The major portion of the consideration was prior bonds and notes, one of which was executed by all the brothers jointly, and the rest were incurred by the younger brothers. Neither in the mortgage deed nor in the prior document was the eldest brother described as managing member. The creditor and the executant tried their best to persuade the rest to sign, but they refused. On these facts:—

Held, that the document was not intended to bind the executants till all had signed and completed it and that it never went beyond the stage of an unperfected proposal.

Sivaswami Chetty v. Sevngan Chetty.

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Patta :—See Rent Recovery Act.

Presumption as to widow's estate in accretions :—See Hindu Law from husband's estates.

Rent Recovery Act VIII of 1865, S. 11—*Dry lands—Wet cultivation—Landlord's water claim for use of water—Enhancement—Rent—Patta—Possible contingency—Mode of determining amount of rent.*

A claim for the use of the landlord's water in cultivating dry lands with wet crops is not an enhancement within the last clause but one of S. 11 of the Rent Recovery Act and does not require the sanction of the Collector.

A payment for the use of the water for the cultivation of wet crops is rent and may properly be included in a patta.

It is not improper to specify in a patta the terms by which the parties should be bound in the event of a possible contingency which may arise.

Where a question arises as to what rent should be paid by the tenant if he cultivated wet crops on dry lands with landlord's water, the Revenue Courts should proceed to determine it in accordance with the provisions of section 11 of Act VIII of 1865.

Venkata Rao v. Vaithilinga Udayan 22

Res judicata :—See Execution.

Widow's Estate in accretions from husband's estate :—See Hindu Law.

Security, refusal to receive :—See Letters Patent.

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Jurisdiction:—*See* Court Fees (1 and 2).

Order absolute:—*See* Transfer of Property Act.

Ownership in streets:—*See* District Municipalities Act.

Indian Penal Code, Ss. 420 and 468—*Cheating—Forgery—Wrongful gain—Wrongful loss—Damage or harm—Attempt.*

Where a person was charged with cheating the Registrar of the University of Madras by passing himself off for another person and trying to obtain a duplicate of the matriculation certificate of that other person:—

Held that there was no proof of harm or damage to the Registrar or to the University and no wrongful gain to the accused or loss to the University and that therefore the charge of cheating must fail

Where he was also charged with forgery of a document for the purpose of obtaining a duplicate copy of the certificate.

Held that the charge of forgery must also fail because there was no evidence that he forged dishonestly or fraudulently and with intent to cause damage or injury to the public or to any one.

The attempt to obtain University certificate with the object of using it as his own subsequently for the purpose of obtaining a temporal advantage, is a mere preparation not indictable as an attempt within the meaning of S. 511, I P. C.

Srinivasan v. The King Emperor 68

Redemption—*Delivery of title deeds on payment of money—Title deeds lost—Right to demand security from the judgment-debtor.*

In execution of a decree for redemption, the mortgagee judgment-debtor who had been directed to deliver the title deeds to the mortgagor decree-holder on receipt of the decree amount, but who having lost them was unable to return the same, cannot, in the absence of an express provision in the decree, to that effect, be compelled to give security for the value of the property.

Subbaraya Iyen v. Padmanabha Vadhyar 68

Right to demand security from the Judgment-debtor:—*See* Redemption.

Spes Successionis:—*See* Hindu Law (1).

Succession to an adopted son:—*See* Hindu Law (2).

Suit for accounts —*See* Court Fees.

Suit for specific performance:—*See* Civil Procedure Code.

Suit for possession subsequent to a suit for conveyance, when allowed:—*See* Civil Procedure Code

Transfer of Property Act, S. 89 —*Order absolute—Notice—Civil Procedure Code, S. 248.*

When an application for an order absolute for sale under S. 89 of the Transfer of Property Act is made to the Court within one year of the date of the decree, no notice need be given to the judgment-debtor.

Krishna Aiyar v. Muthusami Aiyar, ... 62

Trespass on free-hold:—*See* District Municipalities Act.

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Widow's Reversioner:—*See* Hindu Law (1).

Adopted Son's heir—*See* Hindu Law (2.)

Contract between widow and nearest reversioner for the time being not binding on actual reversioner:—*See* Hindu Law.

Civil Procedure Code, S. 43—*Contract of sale—Suit for specific performance—Conveyance—Subsequent suit for possession—Parties—Representatives—Bar.*

Where under an agreement to sell land the vendee was entitled to immediate possession or the right to a conveyance and the right to possession arose coincidently, the vendee cannot first bring a suit for a conveyance and afterwards another suit for possession. But where the right to possession arose only on the execution of the conveyance in the previous suit, a fresh suit for possession is not barred by section 43 of the Code of Civil Procedure.

In a previous suit against the 1st defendant alone, the plaintiff got a conveyance executed by him on behalf of himself and his minor brothers, defendants 2 to 4. In the present suit to recover possession brought against all the brothers, S. 43, C. P. C., was pleaded in bar of the suit:—

Held, that if S. 43 was a bar to the suit as against the 1st defendant, it was equally a bar to it as against defendants 2 to 4.

Chinna Krishna Reddi v. Dorasami Reddi. ... 71

Court Fees:—*Suit for accounts—Jurisdiction—Valuation—Amendment of plaint—Alteration of jurisdiction.*

In a suit for accounts the amount at which the plaintiff *bona fide* values his claim determines the court fees and the jurisdiction of the court.

When once the plaintiff has put a *bona fide* valuation on his claim, he cannot afterwards be permitted to amend the plaint by altering the valuation, especially if such alteration will oust the jurisdiction of the court.

Where the District Munsif permitted an alteration of the valuation and afterwards returned the plaint for presentation to a higher court.—

Held, that the order permitting the amendment was wrong and must be set aside and that the District Munsif had jurisdiction to try and decide the suit.

Such *bona fide* valuation does not affect the plaintiff's right to recover a larger sum, if, on taking accounts, a larger sum is found due. Only the plaintiff will have to pay court fees on the excess before executing the decree for the larger sum.

Arogya Udayan v. Appachi Rowthen

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Court fees—Accounts, Suit for:—Valuation—Larger sum found due—

Additional duty demanded—Dismissal for non-payment—Relinquishment.

In a suit for accounts, the valuation which the plaintiff puts upon his claim determines the jurisdiction of the court and the amount of court fees. In such suit a decree may be passed for a larger amount, though the decree cannot be executed until the fee is paid for the additional amount.

In a suit for accounts, on finding that a larger sum might be due than was claimed in the plaint, the court insisted on the payment of additional duty in the course of the suit. The plaintiff offered to relinquish his claim for the additional amount but the court held he had no power to relinquish the claim and dismissed the suit for default in paying the fee —

Held:—that the order was erroneous and that the relinquishment made in consequence of such erroneous order was not binding on the plaintiff, especially as he had not been permitted to relinquish his claim.

Sellamuthu Servagar v. Ramaswami Pillai

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District Municipalities Act—Municipalities—Vesting of Streets—

What vests—Freehold—Ownership of land dedicated as highway—Limitation—Limitation Act, 142, 144, 146A—Once a highway, always a highway—Encroachment on highway—Obstruction—Trespass on freehold.

The statutory vesting of streets in the Municipalities is not of the land or the subsoil of the streets, but only of the streets as streets and the municipalities have only so much right to the land and the soil below as is necessary for the repair and maintenance of the streets as streets subject to the burden of the highway. The freehold of the land and the subsoil continues in the original dedicators whoever they may be, the Government or private persons, or vests in the owners of the houses on either side *ad medium filum*.

Adverse possession of a land dedicated as highway will give the ownership of the land in 12 or 60 years according as the owner is a private person or the Government, and the burden of highway will be extinguished in 30 years according to Art. 146A.

Semble that the doctrine "once a highway, always a highway" was not applicable to India even before the enactment of Art. 146A and adverse possession of a highway for 12 years before the passing of 146A would have extinguished the highway.

An encroachment on or obstruction in a highway is a public nuisance as well as a trespass upon the freehold for which an action may be maintained by the owner.

Sundaram Aiyar v. The Madura Municipal Council 37

Hindu Law—Widow—Reversioner—Spec successionis—Contract between widow and nearest reversioner for the time being—Actual reversioner—How far bound by contract.

The nearest reversioner of a Hindu widow has during her lifetime only an expectancy or a *spec successionis* and any contract which such expectant heir may enter into with the widow in reference to the expectancy is not binding upon the actual reversioner though the latter may trace his relationship to the owner through the former.

Bahadur Singh v. Mohar Singh 53

Reversionary—Bandhu—Propinquity—Adopted son—Natural father—Nearness for succession.

Where a person has been removed from his natural family by adoption, his heirs should be sought for among those related to him in his new family and relationship in his natural family is of no account in the matter of succession.

Where two persons are equally entitled to succeed as bandhus to a deceased man in his adoptive family, the fact that one of them is more nearly related to the deceased in his natural family does not entitle him to succeed in preference to the other.

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See Civil Procedure Code (1).

Amendment of decree after satisfaction, effect of:—*See* Civil Procedure Code (2).

Ancestral property, gift by father, validity of:—*See* Hindu Law (1).

Appeal against decree—revision:—*See* Civil Procedure Code (7).

Appeal—Part heard appeal—Transfer by District Court to Sub-Court—Ultra vires.

A District Judge has no jurisdiction to transfer a part-heard appeal before him to a Subordinate Judge's Court, and the judgment of such Subordinate Judge after such transfer must be set aside as illegal and *ultra vires*.

Kumaraswami Reddiar v. Subbaraya Reddiar, I. L. R., 23 M., 314 followed.

Sriramamoorthy Chetty v. Pandara Goundan 117

Application to set aside award:—*See* Civil Procedure Code (7).

Attachment of equity of redemption:—*See* Civil Procedure Code (10).

Award, erroneous decision by arbitrator, effect of:—*See* Civil Procedure Code (7).

Bhatta Vrithi Inams—Enfranchisement:—*See* Hindu Law (2).

Civil Procedure Code, Secs. 26, 28, 43 and 50—Cause of action—Ground of title common—Plaintiff's right infringed by different defendants—Omission to include all.

Cause of action in section 43, C. P. C., has reference entirely to the grounds set forth in the plaint and has no relation whatever to the defence. It is not something independent of the defendant, but has reference to the defendant against whom relief is claimed.

Cooke v. Gill, L. R. 8 C. P. 107; *Sankar v. Day Sankar*, L. R. 15 I. A. 66; and *Chund Kour v. Pertab Singh*, L. R. 15 I. A. 158 referred to.

A cause of action against one person is not a part of the cause of action against another if it is not a joint one against both. Section 43 has no application to a case where though the ground of title is one and the same in both suits and the cause of action arises at the same time, the persons infringing the plaintiff's right are different and there was no manner of combination or privity between the said persons.

Though under S. 26 C. P. C. several defendants are permitted to be joined, if the reliefs claimed arise in respect of the same matter but not under different causes of action, the plaintiff is not bound so to

join and S. 43 does not bar the institution of several suits in respect of such causes of action, as there is no splitting of a single cause of action.

A plaintiff may at his option bring one suit against several defendants to set aside all alienations made by a widow in their favour when he has the same ground of title or he may bring different suits against each defendant. The mere fact that he has the option to bring one suit against all does not make his omission to include one defendant (alienee) in a prior suit a bar under Sec. 43, C. P. C., to his subsequent suit against another not made party in the 1st suit.

Jahan Beeber v. Saivul Ram, 1 Agra High Court, Part III, p. 109; *Koor Golab Sing v. Rao Kurrum Singh* v. 14 M. I. A. 176; *Rao Kurrum Sing v. Fyz Ali Khan*, 14 M. I. A. 187 followed.

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Civil Procedure Code, Ss. 206, 244, 263 and 264—Amendment of decree after satisfaction—Nullity—Decree for possession satisfied—Subsequent dispossession—Fresh cause of action.

An amendment of the decree after satisfaction entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction.

Where in a suit for partition a decree for joint possession was first passed, but it was subsequently amended into one for actual partition after joint possession was given to the decree-holder and satisfaction entered:—

Held, that the amended decree was a nullity, and that on a subsequent ouster from joint possession a fresh suit might be brought.

Pathambi v. Mytheen Bibi

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S. 257-A—Decree—Execution of a mortgage bond for judgment-debt—Decree kept alive—Mortgage void.

Where for the discharge of a judgment-debt, the debtor executed a mortgage bond to the decree-holder, promising payment of the amount by instalments but the decree was still kept alive for the benefit of the creditor in case the debtor should make default in paying the debt:—

Held that the mortgage was a contract to give time for the payment of the judgment-debt within the meaning of S. 257-A of the Code of Civil Procedure and that it was void for want of sanction by the Court.

Seemle:—that if the decree had been surrendered as satisfied in consideration of the execution of the mortgage bond, the judgment-debt would have ceased to exist and the mortgage would not be within the prohibition of S. 257-A.

Tukaram v. Anantbhat, I. L. R. 25 B. followed, *Jigi Kamti v. Anna Bhatta*, I. L. R. 17 M. 382 and *Hukum Chand Oswal v. Taharungessa Bibi*, I. L. R. 16 C. 504 dissented from.

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**Civil Procedure Code, Section 258, para 2.—Payment out of Court—
Judgment-debtor's right to apply for certifying payment.**

A judgment-debtor who has discharged the decree by payment out of Court may at once apply to the court to enter up satisfaction of the decree and is not bound to wait and see whether or not the decree-holder would himself certify satisfaction to the court.

Valambal v. Logambal Ammal 94

**S. 276—Attachment—Prior mortgages—Discharge by
mortgagor from money raised on a fresh mortgage—Execution sale—Priority
of mortgage over sale—Intention.**

Section 276, C. P. C., does not render all alienations by the judgment-debtor void so as to confer a benefit on the judgment-creditor which he never had at the time of the attachment and which it was not intended he should have subsequent thereto, but only those which prejudicially affect the judgment-creditor.

An attachment of property over which there is a mortgage subsisting affects only the equity of redemption. A payment of the mortgage by a person claiming under the judgment-debtor or by the latter, on behalf of that other with the intention of keeping alive the old mortgage does not ensure for the benefit of the execution-creditor just as a further advance or a subsequent mortgage in renewal of the prior mortgage will not affect him prejudicially under S. 276, C. P. C.

When an owner of an estate pays charges on the estate for which he is not personally liable, the question whether such payment operates as an extinguishment of such charges or otherwise, depends upon the intention of the parties. An intention to keep alive the prior charges will be presumed when it is for the benefit of the person paying. Payment by a judgment-debtor of his own charges pending attachment for the benefit of a person who has advanced the money and under an agreement with him operates to keep alive such charges for the benefit of the person who has so advanced.

Where a judgment-creditor while the attachment on the equity of redemption was pending mortgaged his estate to pay off prior charges created before the attachment and out of the mortgage amount paid off such charges and got a re-conveyance from the holders of the prior charges and the re-delivery of the title deeds together with the documents creating the charges and delivered all such to the mortgagee in pursuance of an agreement with the latter who was to have the first charge on the property represented to be unincumbered.

Held that the judgment-creditor could not claim to have the benefit of this payment and a purchaser with notice of these facts in the execution sale could only take a title subject to the mortgage.

Dinobundha Shaw Chowdhry v. Jogmaya Disi 72

Civil Procedure Code, Ss. 291 and 311—Sale in Court precincts, adjournment of, without court's order—Irregularity—Res-judicata in execution proceedings.

An order in execution proceedings passed after notice to the judgment-debtor and determining the rate of interest payable on the decretal amount cannot be questioned by the judgment-debtor in subsequent proceedings.

A sale of property in, or in the precincts of, the court-house cannot be adjourned without the leave of the court under S. 291, C. P. C., and a sale so held after such adjournment must be set aside as irregular under section 311, C. P. C., when in consequence of such irregularity the property has been sold for an undervalue.

Alayakkammal v. Arnachala Chetty.

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—, *Ch. XXXVII, Sections 521, 522, 622—Award—Error of Law—Application to set aside—Limitation Act XV of 1877, Art 158, Sch. II and S. 12—Appeal—Revision—*

Arbitrators are Judges of law and fact, and mere error of law does not vitiate the award. They may give an award on the whole case or on each point.

An application to set aside the award, must be made within 10 days from the time the award is submitted to the court subject to the deduction of the time requisite for obtaining a copy of the award as prescribed in section 12, Limitation Act, of 1877. A court is bound to take notice of a point of limitation even though no plea is raised by the parties.

No appeal lies where the decree based upon the award is not in excess of or not in accordance with the award; and much less a revision under section 622.

Judgment of Clerk, J. in 84 P. R. 1901 approved.

Ghulam Jilani v. Mahammad Hassan.

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Court Fees Act, Sec. 7, Cl. C.—Suit to enforce registration—Declaration—Consequential relief—Proper fee.

A suit to enforce registration of a document under section 77, Act III of 1877, is not a suit for a mere declaratory decree but one in which consequential relief is prayed for. The proper stamp fee must be calculated with reference to the amount at which the relief is valued under section 7, Cl. IV-C., Court Fees Act.

Pydal Nanbiar v. Kanuan Nambian

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—, *Sch. IV, Art. 17, Cl. 12—Suit to enforce Registration—Proper stamp for suit and appeal.*

The proper Court fee payable on a plaint and a memorandum of appeal against a decree in a suit to enforce registration of a document

under section 77, Act III of 1877, is a fixed fee of Rs. 10 only and not *ad valorem* of the properties comprised under the document.

Juntoo v. Raja Canto Doss, I. L. R., 8 C. 315, followed.

Pydal Nambiar v. Kannan Nambiar, 12 M. L. J. B. 87, not followed.

Savarimuthu Pillai v. Alagiam Pillai.

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Criminal Procedure Code, S. 145:—See Evidence.

Cause of action (fresh) on disturbance of joint possession under a decree.—See Civil Procedure Code (2)

— in S. 43, C. P. C., **Meaning of.**—See Civil Procedure Code (1).

Declaratory suit—consequential relief.—See Court Fees Act (1).

Decree, adjustment of, by mortgage without Court's action. effect of.—See Civil Procedure Code (3).

Equity of redemption.—See Civil Procedure Code (5).

Evidence—Criminal Procedure Code S. 145—Order as to possession, effect of—Admissibility of order—Possession—Burden of proof—Indian Evidence Act, S. 13—Report—Map—Admissibility—Extrinsic evidence—Privy Council Practice.

An order under S. 145 of the Code of Criminal Procedure does not confer any title on the person in whose favor the order is made

The person declared by the order to be in possession is, however, entitled to retain such possession until he is evicted by a person who can prove a better title or who can prove a better right to possession.

Orders under S. 145 are, on general grounds and under S. 13 of the Evidence Act, admissible even as against other persons though not parties to the order to prove the fact of the passing of such orders, the parties to the dispute of the land in dispute and the person declared entitled to possession. If the order describes the lands by metes and bounds or with reference to physical marks, extrinsic evidence is admissible to prove their identity. If maps accompany such orders, maps are admissible to explain the orders and extrinsic evidence is admissible to identify the objects shown in the map. Reports accompanying the orders or maps but not referred to in the orders are admissible as hearsay evidence of reputed possession or under the provisions of S. 13 of the Evidence Act.

In a case of disputed boundary it is not enough for the appellant to throw doubts upon the respondent's case or to show that the respondent's title is not free from doubt, but the appellants must show clearly where the judgment of the appellate Court is wrong and what other course is right.

Dénomoni Chowdhurani v. Brojo Mohini Chowdhurani

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Gift by father of ancestral property—effect of:—See Hindu Law (1).

Hindu Law—Ancestral property—Gift by father in favor of married daughter and son-in-law—Invalid as against undivided son.

A gift of ancestral property by a father to his indigent married daughter for her maintenance is void as against his undivided son; and so is a gift to the son-in-law, made for no consideration but only out of love and affection.

Nataraja Pillai v. Venkatachella Pillai

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————— **Bhatt Vriithi Inams—Personal Inams—Enfranchise—ment in favour of widow, effect of—Rights of Reversioners.**

The enfranchisement of a personal inam unlike that of a service inam generally reserves the reversion to the Government in the absence of lineal descendants of the holder.

Where after the death of a Hindu widow in whose name a personal inam had been enfranchised, the person claiming under the collateral heirs of the husband who had no lineal descendants sued to recover the inam lands.—

Held that the plaintiff had no right to claim the same in preference to the reversionary right of Government.

Subba Naidu v. Nagayya

89

————— **Covenant in restraint of partition—Agreement to divide income—Right to demand partition.**

Members of a family who have become divided in status by agreement of parties may sue for a partition by metes and bounds as ordinary tenants in common. A mere agreement to take the income of some property in certain shares does not amount to a covenant not to ask for partition. A member cannot ask for share in family property when he has agreed to take a lump sum in lieu of such share.

Subbaraya Tawker v. Rajaram Tawker

91

Judgment-debtor's right to apply for certifying payment out of Court—See Civil Procedure Code (4).

Jurisdiction to transfer a part heard appeal.—See Appeal.

Limitation Act XV of 1877, Art. 153, Sh. II and S. 12.—See Civil Procedure Code (77).

————— **XV of 1877, S. 19—Redemption Suit—Onus of proof—Subsisting title—Acknowledgment of liability—Evidence aliunde.**

In a suit for redemption the onus is on plaintiff to show not only that there is a mortgage, but also that he has a subsisting title to redeem. He must prove the date of the mortgage affirmatively.

An acknowledgment to be valid under section 19, Limitation Act, must amount to an acknowledgment of liability to plaintiff. It must

appear, on the face of the acknowledgment, that there was an existing liability, and such liability cannot be read into it by proof *aliunde* though the nature of the right or liability referred to in the acknowledgment may be proved by evidence *dehors* the written acknowledgment.

A mere declaration by the mortgagee that the mortgagor is the owner will not be a sufficient acknowledgment of the mortgagor's title unless the mortgagee further acknowledges that he is in possession (or holds under the mortgagor).

Notes of inspection by a Judge, no legal evidence :—*See Evidence*

Onus of proof in redemption suit :—*See Limitation Act (2).*

Privy Council practice :—*See Evidence*

Res Judicata in execution proceedings :—*See Civil Procedure Code (7).*

Sale in Court precincts, adjournment of, without court's order, effect of :—*See Civil Procedure Code (6).*

Suit to enforce registration, proper stamp for :—*See Court Fees Act (2).*

Valuation of suit and appeal :—*See Court Fees Act.*

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Agreement (implied) to pay enhanced rate.—*See* Landlord and Tenant (2).

Assessment.—*See* Landlord and Tenant (2).

Civil Procedure Code, Es. 2, 13, 244 and 250—*Transfer of Property Act, Es. 60, 67, 86, 87, 88, 89, 92 and 93—Limitation Act, Art. 179, 2nd Schedule—Court Fees Act, Schedule II, No. XI—Government Notification—Specific Relief Act, S. 42—First suit for redemption and decree not executed—Second suit barred—Stay of execution—Application for extension—Res judicata.*

Where the plaintiff in a redemption-suit obtains a decree for redemption and fails to execute it by payment of the amount within the time fixed in the decree, he cannot afterwards be permitted to bring a second suit for redemption, whether the mortgagee defendant has or has not obtained an order absolute for foreclosure or for extinguishing the plaintiff's right of redemption. Such second suit will be barred by the rule of *res judicata*.

Sami Achari v. Somasundara Achari, I. L. R., 6 M. 119; *Periand v. Angappa*, I. L. R., 7 M. 423; *Karuthasami v. Jagannatha*, I. L. R., 8 M. 478; *Ramunni v. Brahma Dattam*, I. L. R., 15 M. 366; *Nainappa Chetty v. Chidamlaram Chetty*, I. L. R., 21 M. 18, overruled.

Ramasami v. Sami, I. L. R., 17 M. 96, discussed

Per C. J. :—The remedy will be barred by S. 13 though the right may subsist by reason of there being no order passed under S. 93, T. P. Act.

Obiter :—*Per C. J.*—The equity of redemption remains unenclosed and the relation of mortgagor and mortgagee continues until the order absolute which is contemplated by S. 93, T. P. Act, is made.

Obiter :—*Per Moore, J.*—Where a mortgagor (plaintiff in a redemption suit) fails to pay the amount due to the mortgagee (defendant) within the time fixed in the decree for redemption, he may apply to the court for an extension of time (even though no application for order absolute for foreclosure is made by the mortgagee) under the last clause of S. 93, T. P. Act, and the court must grant such application if good cause is shown for such extension.

Per Bhashyam Aiyangar, J.—The mortgagor's right of redemption and his cause of action to sue to establish that right is exhausted by bringing the suit for redemption and is extinguished by the decree obtained in that suit and is not revived if he fails to execute the decree within the time allowed or allows it to get barred by limitation without applying for an extension as contemplated by the proviso to S. 93, T. P. Act.

A decree for redemption of a mortgage is not merely a declaratory decree but a decree establishing the plaintiff's right and entitling him to the consequential relief (*vide* Es. 60 and 67, T. P. Act) and a person who has obtained a decree establishing his right and entitling him to the consequential

relief cannot again sue for the same but can only work out his right and obtain the relief by executing the decree. A separate suit for the purpose is prohibited by S. 244, C. P. C.

Obiter :—A person obtaining a mere declaratory decree establishing a right of the nature contemplated by S. 42, Specific Relief Act, is not barred from bringing a subsequent suit to obtain a relief consequent upon such right, though the decree will be conclusive in his favor as evidence as to the right adjudicated upon.

Obiter :—Though in regard to the execution of a decree, the initiative will have to be taken by the party entitled to execute the decree, yet in regard to the stay of its execution, the party against whom it may be executed may take the initiative and apply for and obtain stay of execution in anticipation or apply for such stay when motion is made for execution of the decree.

Obiter :—A mortgagor may, after the time fixed in the decree, exercise his right of redemption under the decree, if he is not barred by limitation by obtaining a postponement of the day fixed for payment if he makes out a good cause for such extension of time. An order for extension of time under Ss. 87 and 93 of the T. P. Act is an order for the stay of the execution of the decree within the meaning of S. 244, Cl. (c), C. P. C., and may therefore be made by the court executing the decree and not necessarily by the court passing the decree.

Obiter :—The mortgagor (plaintiff in a redemption suit) may himself apply for sale on default of payment of the mortgage money within the time fixed in the redemption decree in execution of the decree made under the last para of S. 92, T. P. Act.

Obiter :—Decrees under sections 86, 88 and 92 are the final judgments or decisions in the suit and will be appealable as 'decrees' under the 1st part of the definition of 'decree' in S. 2, C. P. C., and applications made under sections 87, 89 and 93 will be governed by Article 179 of Schedule II, Limitation Act, and orders passed thereon will be appealable under section 244, Cl. (c) of the Limitation Act, subject to the payment of the fixed court-fee of Rs. 2 according to Government Notification.

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— **Ss. 231, 257, 258 and 461** :—See Limitation Act (3).

Court-fees Act, Sch. II, No. XI :—See Civil Procedure Code.

Execution of decree, application for :—See Limitation Act (3).

Landlord and tenant, lease by mortgagee—Determination of tenancy—
See Limitation Act No. (1).

2. ————, **Demand by Landlord of Enhanced rent**—
Tenant's right to complain accrues on each demand—Limitation—Regulation XXV of 1802, S. 3—Payment to landlord of enhanced rate for a long time—Promise by landlord to return excess—No implied agreement—Absence of consideration.

The tenant's right to sue for a declaration that he is not liable to pay an enhanced rate arises on each demand by the landlord for such rate.

Under Regulation XXV of 1802, section 3, the assessment should be determined in a case of dispute with reference to the sanads and kabuleats and the conditions under which they were entered into.

An agreement to pay an enhanced rate cannot be implied from mere payment of such rate for a long series of years to the landlord when the latter admits at the time that he has no legal right to claim such rate and promises to return the excess. An implied agreement to pay an enhanced rate cannot be enforced when there is no consideration for the same.

Gopaladasu v Ferraju 126

Limitation.—See Landlord and Tenant (2).

Limitation Act, Art. 139.—*Mortgagor and mortgagee—Tenant under mortgage—Permanent rights of occupancy—No adverse possession as against mortgagor—Determination of tenancy—Act IV of 1882, section 111.*

A person who is let into possession as a mere tenant from year to year or for a term of years or as mortgagee cannot, during the continuance of such relation by any assertion of title higher than that of such tenant or mortgagee acquire such title by adverse possession, even though the assertion was made to the knowledge of the landlord or mortgagee.

A tenancy can only be determined in one of the ways mentioned in S. 111 of Act IV of 1882, and a landlord's title can only be extinguished at the end of the period mentioned in Art. 139 of the Limitation Act.

A permanent lease granted by the mortgagee can hold good only as against the latter and until redemption of the mortgage.

Seshamma Shettati v. Chikaya Hegade 119

2. ————, **Art. 179.**—See Civil Procedure Code.

8. ————, **Art. 179 and Ss. 7 and 8.**—*Civil Procedure Code, Ss. 281, 257, 258 and 461—Joint decree-holders—Last application for execution when some were minors and some majors—Application for execution by minors after attaining age more than 8 years after last, barred.*

Section 8 has no application to joint execution creditors who are not 'Joint creditors' within the meaning of the said section.

Section 7 has application only when all the joint execution creditors are under disability at the time when the period of limitation begins to run and not when some of such joint execution creditors are majors and the others minors.

Seshan v. Rajagopala, I. L. R., 13 M. 236 and Vigneswara v. Bapayya, I. L. R., 16 M. 486 approved.

Surjikutwar Dutt v Arunchandra Roy, I. L. R., 28 C. 465; Govindram v. Tatia, I. L. R., 20 B. 388, and Zamir Hasan v. Sunder, I. L. R., 22 A. 199 dissented from.

The words 'Person entitled to...make an application' mean a person entitled as of right to make an application in his own right or on his own behalf and not merely a person entitled to make an application for an order in the terms of S. 231, C. P. C., which, however, cannot be asked for as of right but which the court may be empowered to make in the exercise of its discretion. Section 231, C. P. C., has no bearing on the construction of section 7 of the Limitation Act.

The general rule laid down in col. 3, para 1 of Art. 170 of the Limitation Act prescribes the starting period of limitation for an application for execution as the date of decree. This is, however, subject to five exceptions provided in paras 2, 3, 4, 5 and 6 of the same column.

Tolst Mohun Misser v. Janoky Natts Roy, I.L.R., 20 C. 714 dissented from.

It is not open to the party who seeks the benefit of S. 7 to select his own starting point without reference to the exceptions laid down in paragraphs 2, 3, 4, 5 and 6.

A joint decree which is not executable as a joint decree by reason of some of the joint-decree-holders becoming barred does not become severed so as to become executable as regards the interests of the other joint-decree-holders unless by act of parties or by operation of law the interest of one joint decree-holder devolves upon the judgment-debtor when to the extent of such severance it becomes divisible.

Where, therefore, a joint decree for money was obtained by 3 brothers when all of them were minors and the last application for execution was made when two of them had attained age and the other was still a minor, and no application was made thereafter by the major brothers; but the youngest and the other two elder brothers made the present application within 3 years of the youngest attaining majority but after 3 years from the date of the last application.

Held by the Full Bench.

That the applicant had not 3 years from the date of his majority to execute the decree which he would have under para. 1, col. 3, Art. 179, coupled with S. 7 if there was no previous application for execution at all, that the applicant being only one of joint-decree-holders could not call in aid the benefit of S. 7 of the Limitation Act which would only apply when all the decree-holders were minors at the date of the last application for execution and that execution of the decree was barred by limitation, three years having elapsed from the date of the last application.

Per Bhashyam Aiyangar, J.—Sections 7 and 8 of Act IX of 1871 had no application to the case of execution applications and though sec. 7

has been modified by Act XV of 1877 so as to include execution-applications the scope of S. 8 has not been widened by the present Act, and therefore judgment-creditors and execution-creditors (meaning respectively those whose claims are merged in a judgment and those who have obtained levy of execution) are not joint-creditors and claimants within the meaning of section 8 and therefore sec. 8 has no application to the case of joint-judgment-creditors or joint execution-creditors.

Obiter.—Under S. 257, C. P. C., payment out of court must be made in the case of joint decree-holders to all of them. A payment to one of several joint decree-holders is not binding on the others and cannot be recorded as certified under S. 258 unless the decree-holder receiving payment was also constituted as the agent of the others.

Obiter.—Even where the joint decree-holders are members of an undivided family and one of them is the family manager, the latter is not empowered to give a discharge of the decree-debt without the concurrence of the others and is further not empowered to execute the whole decree as of right. The manager is also subject to the provisions of S. 231, C. P. C., which gives only a discretion to the court to allow any one of the joint decree-holders to execute the whole decree on sufficient cause. An order under that section will, as a general rule, be a direction to the applicant for execution to furnish security for the protection of the interests of such persons. If one of the joint decree-holders or if the sole decree-holder is a minor, his guardian or next friend will not be allowed under S. 461, C. P. C., to receive any money payable to such minor under the decree without obtaining leave of the court and without, as a general rule, furnishing security.

Periasami v. Krishnaiyan 166

Malras Regulation XXV of 1802, S. 3.—*See* Landlord and Tenant (2).

Mortgage, redemption decree, second suit for redemption.—*See* Civil Procedure Code.

Mortgagor and Mortgagee—Lease by mortgagee, effect of, on redemption.—*See* Limitation Act (1).

Permanent lease by mortgagee.—*See* Limitation Act (1).

Res Judicata—*See* Civil Procedure Code.

Transfer of Property Act, Ss. 60, 67, 86, 87, 88, 89, 92 and 93.—*See* Civil Procedure Code.

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A Court has no power to adjourn a suit for trial when it is shewn that one of the defendants died leaving legal representatives and the cause of action did not survive solely to the surviving defendants. The court cannot proceed further with the suit until the course prescribed in section 368, C. P. C., which is applicable to such a case, is taken (or until the time fixed by law for taking such a course has elapsed).	
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An adopted son does not claim through or by right of the widow adopting him with respect to any of her husband's property improperly alienated by her prior to adoption and the period of limitation for a suit by the adopted son to recover such property will not be calculated from the date of the alienation but only from the date of adoption.

Though the widow represents fully the estate of her husband, she does not represent it for purposes of limitation and limitation does not run against the reversioners during her lifetime. An alienation made by the widow succeeding to her husband's estate with a power to adopt is valid and binding upon the adopted son (or the reversioner) if made for justifiable

necessity, but, if not made for any such purpose, will not be binding on the reversioners and much less on the adopted son.

An adopted son divesting the estate of his adoptive mother is not entitled to recover from the alienee immediate possession of property improperly alienated to the latter by the adoptive mother before adoption and the alienee has a good title to remain in possession until the period of her natural life or until remarriage.

An adopted son is only entitled to succeed to the inheritance as it exists at the time of adoption and when the adoption is made by the widow after the husband's death, the adopted son's rights do not relate back to the date of his adoptive father's death.

A widow has an absolute right to the fullest beneficial interest in her husband's property for her life and until adoption has a personal right therein which she can transfer, of her free-will and pleasure so as to endure for her life.

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Interest on legacy, rate of.—See Limitation (2).

Landlord and Tenant.—*Transfer of Property Act* Ss. 2 (c), 10, 108(e), 111 (g) and 117—*Permanent lease—Covenant against alienation—No right of entry nor condition—No forfeiture.*

The principles enunciated in Ss. 10 and 111 (g) of the Transfer of Property Act may equally be applied to cases of leases not strictly governed by the Transfer of Property Act [Ss. 2 (c) and 117)].

A covenant in a lease restraining the lessee from alienating his interest is valid, (*vide* S. 10, Transfer of Property Act) such a stipulation being clearly intended for the lessor's benefit. The lessor will be entitled to sue for damages for a breach of such covenant and he will also be entitled to an injunction restraining the lessee from making an assignment in breach of the same.

Nil Madhub Sikdar v. Narottam Sikdar, I. L. R., 17 C. 826 dissonated from.

Waiver by the landlord of a breach in consequence of the alienation made by the lessee will not debar the landlord from taking advantage of a 2nd breach arising from a subsequent alienation made, it may be, by the original lessee's alienee.

A bare covenant in a lease restraining the lessee from transferring his interest does not operate as a forfeiture of the lease and will not entitle the landlord to evict the lessee from possession unless a right of re-entry is given in consequence of such breach or the lease is subject to a condition that on such breach, the lease shall become void.

A lessee alienating his interest in breach of a covenant not to alienate will not free himself from liability to fulfil the obligations under the lease and the alienee will not be entitled to the benefits of the contract of lease

(vide S. 108 c of the Transfer of Property Act) so that a landlord may even after such alienation rise, by attachment and sale of the leasehold interest, arrears of rent due by the original lessee.

Where, therefore, a permanent (mulgeni) lease was given with a stipulation that the lessee "had no right to alienate the holding to anybody in any manner, whatever" and that in the event of the lessees "not requiring the land" he would sell the improvements to the lessor at a valuation to be made by four respectable persons and that he would not sell the same to any one else, and the landlord sued to evict the defendants who were assignees from the assignees of the original lessee.

Held (1) that such a stipulation did not give a right of re-entry on the breach thereof.

(2) that the lease was not conditional on the lessee observing the stipulation and,

(3) that, therefore, there was no forfeiture of the lease so as to entitle the landlord to evict the defendants.

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2. ————— *Civil Procedure Code, Ss. 269 and 316—Transfer of Property Act, Ss. 55 (1) d and (5) b, 108 and 111—Limitation Act, Arts. 109 and 116—Lease for term—Possession—Mode of delivery—Expiry of term—Rights of lessee, on failure to get possession—Damages.*

A lessee for a term of years can, on not being let into possession by the lessor, only claim to be put into possession for the unexpired portion of his term or if the term has already expired, only claim to recover damages but not to be put in possession for a corresponding term from the date of his being placed in possession.

Where the transaction is one of lease, the lessor is bound to place his lessee in possession and this obligation the lessor must perform notwithstanding that the lessee could take legal proceedings to recover possession himself from the persons in occupation and notwithstanding that the lessee may have covenanted to be faithful to the lessor and give him the necessary information and do other acts recited in the lease. Where the ryots are in occupation of land, mere execution and delivery of the lease will not constitute delivery of possession of the demised land but delivery must be made to the lessee in the manner contemplated by the Ss. 264 and 319, O. P.C. unless the lessee in collusion with the lessor's vendor obstructed the lessor from obtaining possession and did so in order that possession might be retained by the vendor himself and not that he might get possession himself as lessee, or unless the lessee forfeited the lease by reason of breach of some of the stipulations in the lease giving the lessor a right of re-entry on such breach and the lessor did some act showing his intention to determine the lease.

The said two sections embody the customary law obtaining specially in Zemindaris and other similar estates, according to which delivery of possession, in cases of transfers by sale, gift, or otherwise is made by the issue of

orders or notices to the karnams and other village officers collecting rents from the ryots and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of land giving intimation of the transfer and requiring them to attend and pay the rents to the transferee.

Where the lessor has from the commencement of the lease ignored the lease and prevented the lessee from taking possession, no intention on the part of the lessor to determine the lease on the ground of forfeiture can be presumed.

A condition in the lease that the lessee should be faithful to his lessor and should not act contrary to his interest or authority can only be construed as having reference to the relation of lessor and lessee.

Where the lessee was not given possession of the demised property from the lessor, his conduct in deposing against the interest of the lessor in a suit brought by the latter against his vendor—whether such evidence be true or false—cannot be taken to be a breach of the condition to remain faithful to the lessor and not to act contrary to his interest.

Where, therefore, a lessor, obtained possession from his vendor several years after the term of the lease had begun to run and when only a small part of the term remained unexpired and the lessor brought his suit to recover possession under the lease for a term corresponding to the one mentioned in the lease but commencing either from the date of plaint or from the date when the lessee obtained possession from his vendee and the District Judge gave him a decree for possession for a term commencing from the latter date.

Held (1) that the District Judge was wrong and that the plaintiff was not entitled to a new lease upon a different term to the one agreed upon in the lease actually executed between the parties.

and (2) that although some part of the term remained unexpired when the lessee filed his plaint yet as it had expired during the pendency of the appeal and the execution of the decree had been stayed pending appeal he could not be given any decree for possession but could only be entitled, to damages.

The lessee is entitled, at his election, to claim either profits of immoveable property wrongfully received by the lessor for the lessee's use or damages for breach of the lessor's obligation to put the lessee in possession.

A suit for recovery of damages for breach of such obligation is governed in the case of a registered lease by the rule of six years under Art. 113 of the Limitation Act.

Where the lessee's claim for profits of immoveable property wrongfully received by the lessor would be barred by Art. 109 of the Limitation Act he will be entitled to claim damages for breach of the lessor's obligation.

The measure of damages in such a case is the amount of profits which would have accrued to the lessee if the landlord had placed him in possession with interest thereon at 6 per cent. per annum.

Zemindar of Visianagram v. Suryanarayana Patula.

3. —————, Civil Procedure Code, S. 623. — Review—Error of Law—Disclaimer by tenant from year to year of landlord's title—Forfeiture.

An application for review of judgment may be entertained on the ground of a bare error of law.

A tenancy from year to year is not determined *ipso facto* at the end of the year in which the tenant disclaimed his landlord's title but subsists unless the landlord does something to show that he intends to put an end to the tenancy by taking advantage of the forfeiture (*vide* S. 111g of the Transfer of Property Act). A tenancy from year to year does not come to an end by effluxion of time as in the case of a tenancy for a term of years but is only determined by due notice to quit (S. 111b of the Transfer of Property Act). *Srinivasa Aiyar v. Mathusami Pillai*, I. L. R., 24 M. 246 affirmed on review.

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Legacy, suit for :—See Limitation Act (1).

Lessee's rights on failure to get possession—See Landlord and Tenant (2).

Limitation Act, Arts 109 and 116 :—See Landlord and Tenant (3).

2. —————, Ss. 120 and 123—Probate Act (V of 1881), Ss. 112, 130, Exception 1, and 136—Legacy, in satisfaction of debt—Administration of estate—Prayer for administration ancillary—Executor's assent—Election to claim as debt and not as legacy—Interest on legacy.

A suit for recovery of a legacy is governed by Art. 123 of the Limitation Act and not by Art. 120 of the same Act, though such suit may involve administration of the estate. The prayer or claim for administration in such suit is only ancillary to the claim for recovery of legacy.

The provision in a will that a sum owing by the testator to another be paid will operate as a legacy in satisfaction of a debt when the same is not intended to be paid till after the testator's death and no provision is made for interest.

The title of a legatee becomes complete when one of the executors consents to the legacy, and such legatee will be entitled to sue for the legacy without being driven to an administration suit which he must do if none of the executors has assented.

Where a legatee supports a claim on the footing that the whole estate of the testator is undivided property in which the testator had no disposing power and fails, he is not debarred from claiming to recover what the testator gave him out of such estate.

A person cannot claim as legacy a sum given in satisfaction of a debt due to him if he had elected to accept money as in repayment of a debt and had so received it. But if he had not received any money, he is not debarred from recovering it as legacy.

Interest on a legacy is claimable at 6 p. c. from the death of the testator if the legacy is given in satisfaction of a debt (*vide* Act V of 1881, S. 180, Excep. I) or if the testator has so directed (S. 186).

Where therefore the plaintiff to whom the testator owed a debt claimed under a provision in a will, "my elder brother Venkatakrishnayya Garu's self-acquisition to the extent of about Rs. 10,000 is kept with me. So, that money should be given to him," and that sum was directed by a codicil of a later date to be paid immediately and in a suit for partition by another brother on the ground that the whole estate of the testator was family property which the latter had no power to dispose of, the plaintiff supported this claim, but he and his brother failed and he brought this suit for recovery of the amount due under such provision within 12 years after the death of the testator but after 6 years from such date.

Held, (1) that the provision was a legacy in satisfaction of a debt,

(2) that the conduct of the plaintiff in the partition suit in which he claimed adversely to the testator and in which the decision was adverse to him does not estop him from suing for the legacy.

(3) that the suit was not one for administration but a suit for recovery of a legacy and is governed by Art. 123 and not 120 of the Limitation Act, and

(4) that interest on the legacy was payable (at 6 p. c.) from the testator's death, the legacy being in satisfaction of a debt and the testator himself having so directed.

Rajamannar v. Venkatakrishnayya Venkatakrishnayya v. Rajamannar ... 183

3. —————. Ss. 140, 141 and 142:—*See Hindu Law.*

Madras Municipal Act 1 of 1884, Ss. 998, Cl. 170, 174, 338, 341 and 420 *Indian Council's Act, 1861 (24 and 25 Vict. C. 67), Ss. 22, 24, 42 and 43—Government timber imported to Madras—Duty to take out license—Crown Prerogative—Construction of taxing statutes—Acts in pari materia—History of Indian Legislation—Powers of Provincial legislatures.*

Timber brought into the City of Madras by or on behalf of Government is liable to the duty prescribed by S. 341 of the Madras Municipal Act and the bringing of such timber without a license is an offence punishable under the last para of S. 341. On the true construction of the Municipal Act, S. 341 is applicable to timber imported by Government, the duty imposed by the section being an Octroi or Town duty.

The provisions for taking out a license under S. 341 of the Madras Municipal Act for importing timber are not ancillary to the provisions of S. 338 and the exemption in favor of Government in S. 338 does not apply to S. 341.

The tolls referred to in S. 174 (and in respect of which Government is exempted) are those tolls which are leviable under S. 170 of the said Act and which are specified in Schedule D of the Act.

The Provincial Legislatures have power to make laws and regulations for the peace and good Government of the provinces within their respective jurisdictions subject to the restrictions imposed upon the Governor-General by the latter part of S. 22 of the Indian Council's Act, 1861, and subject to the restrictions imposed upon the Provincial Legislatures by Ss. 40 and 43 of the same Act. Such laws are not invalid by reason of their affecting the prerogative of the Crown. The local Legislature has therefore power to impose taxation for purposes that make for the peace and good government of this Presidency, notwithstanding such tax may be payable by the Secretary of State for India in Council.

Per Benson, J.

As a general rule, the Indian Legislatures have proceeded upon the assumption that the Government will be bound by the taxing provisions of a statute unless expressly or by necessary implication excluded from its operation.

Per Bhashyam Aiyangar, J

The duty imposed by section 341 is not 'a toll' as defined in the Century Dictionary.

An Indian or Colonial Legislature is not a delegate of the Imperial Legislature and though restricted in the area of its powers, is, within that area, unrestricted.

The exemption of Government from statutory duties and taxes is not really a prerogative of the Crown but depends solely upon the right construction of the statute.

Where the question is whether the Crown is bound by the provisions of Indian statutes by necessary implication though not expressly named, it is a proper rule of construction to refer to the course of Indian legislation and act or statutes in *pari materia* with the act or statute in question.

Colquhoun v. Brooks, L. R. 14 A.C. p. 403 at p. 511 followed

Bank of England v. Vagliano Brothers, [1891] A. C. 107 at pp. 144-145, *Robinson v. Canadian Pacific Railway* [1892], A. C. 487 and *Narendra Nath v. Kamal Buzni Dast*, L. R. 23 I. A. p. 18 at p. 26 distinguished

According to the uniform course of Indian legislation statutes imposing duties or taxes bind Government as much as its subjects except in 2 cases:— (1) when the very nature of the duty or tax is such as to be inapplicable to Government and (2) when the Government is specially exempted.

Major U. Bell v. The Municipal Commissioners for the City of Madras. 208

Permanent lease, forfeiture of :—*See* Landlord and Tenant (1).

Prerogative of the Crown :—*See* Madras Municipal Act.

Probate Act (V of 1881), Ss. 112, 130, exception 1, and 136 :—*See* Limitation (2).

Provincial Legislature, powers of :—*See* Madras Municipal Act.

Toll, definition of :—*See* Madras Municipal Act.

Transfer of Property Act, Ss. 2 (c), (a), 108 (e), 111 (g) and 117 :—*See* Landlord and Tenant (1).

_____, **Ss. 55 (1) d, 108 and 111** :—*See* Landlord and Tenant (2).

_____, **Ss. 111 (b) and 111 (g)** :—*See* Landlord and Tenant (3).

Widow's alienation, effect of, on adoption :—*See* Hindu Law.

Addenda et Corrigenda.

- M. L. J. Reports, p. 183 line 17, *after* the words "to the claim
(Para. 1 of head-note). for recovery of" and before 'legacy,'
insert 'a.'
- (Para. 4 of head-note). line 25, *after* "supports a claim," *add*
"against the will."
- p. 184, line 17, *for* 'does not estop,' *read* 'did
not estop.'
- line 18, *for* "and is governed," *read*
"and was governed."
- p. 185, line 12, *for* "no interest was payable not
being," *read* "no interest was payable,
not having been."
- p. 190, *after* 1st para, *add* "*Nil Madhub Sikdar*
v. Narottam Sikdar, I. L. R. 17
C. 826 dissented from."
- p. 199, line 20. *Omit* 'and other cases.'
- p. 206, line 3. *Omit* the words in brackets 'he
would be sic.'

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Appeal——— *See* CIVIL PROCEDURE CODE (2).

1. Civil Procedure Code Ss. 32, 279, 280, 333, and 372 :—*See* LETTERS PATENT.

2. —————, Ss. 233 and 214 (last clause)—
Representative of decree-holder, order determining, appealable.

An order determining whether a party applying for execution is or is not the representative of the decree-holder is appealable under the last clause of S. 244, Civil Procedure Code.

Sambasiva v. Srinivasa, I. L. R., 12 M. 511 explained and distinguished.
Badri Narain v. Jai Kishen Das, I. L. R., 16 A. 433 and *Manickam v. Tatayya*, I. L. R., 21 M. 388 followed.

Appasami Mudaliar v. Krishnama Chariar 280

3. —————, S. 295—*Same judgment-debtor—Sale of several items—Payment of sale proceeds—Assets realized.*

Where one judgment-creditor obtained a decree against the father and son and in execution attached 4 items of ancestral properties and the latter were sold, and before the sale proceeds of 2 items had been paid into court and after the sale proceeds of the other 2 items had been paid, another judgment-creditor who had obtained a decree against the father only applied under S. 295 for rateable distribution.

Held (1) that the judgment-debtor in both the cases are the same within the meaning of S. 295, Civil Procedure Code, and (2) that the assets could be said to have been realized only when the whole of the proceeds of all the items were paid in court and, therefore, the 2nd judgment-debtor was entitled to rateable distribution of the sale proceeds of all items.

Ramanathan Chettiar v. Subramania Sastrial 276

4. —————, S. 310 A—*Mortgage decree, sale in execution of—Second mortgagee no party, not entitled to apply.*

Sec. 310-A is applicable to the case of a sale held in execution of a mortgage decree.

A person whose interest is not sold and cannot have passed under the sale is not entitled to apply under sec. 310-A.

Where therefore a *puisne* mortgagee applied under sec. 310-A, to set aside the sale held in execution of a decree obtained by a prior mortgagee but to which the former was no party :—

Held that such *puisne* mortgagee had no *locus standi* to apply under sec. 310 A.

Mallikarjarnudu Setti v. Lingamurti Pantulu 279

5. —————, S. 622—*Provincial Small Cause Courts Act (IX of 1887) S. 16 and Art. 31—Sust by landlord for breach of covenant in lease—Sust of a Small Cause nature—Exercise of jurisdiction by Court not vested in it by law—Interference of High Court.*

A suit by a landlord for value of trees cut by his tenant on the land demised in breach of his covenant in the lease is a suit for damages for breach of covenant and as such is cognizable by a Court of Small Causes and is not exempted from its jurisdiction by Art. 31 as a suit for profits of immoveable property belonging to plaintiff but wrongfully received by defendant.

The objection as to jurisdiction can neither be given up by consent nor waived.

The High Court when asked to exercise its jurisdiction under S. 622, C. P. C., must give effect to a plea that the suit was not triable by the ordinary courts but only by a court having jurisdiction as Court of Small Causes, though the point was taken for the first time before it, without any reference to the merits of the case,

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Contract Act S. 134:—See NEGOTIABLE INSTRUMENTS ACT.

Disqualification from inheritance:—See HINDU LAW (1).

Drawer's Liability:—See NEGOTIABLE INSTRUMENTS ACT.

High Court's duty in Revision,—See CIVIL PROCEDURE CODE (5).

1. Hindu Law—*Lameness not congenital*—*Disqualification from inheritance*.

Under the Hindu Law, lameness which is not congenital is no bar to inheritance.

Venkata Subba Row v. Purushottam 262

2. —————, Widow's right to maintenance (including residence)—*Nature of right*—*Purchaser how far affected by such right*—*Widow claiming by right of inheritance*—*Priority of debts*—*Obligation incurred as surety binding on the widow*—*Transfer of Property Act S. 39*.—

Under the Hindu Law, maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of that relation and quite independent of the possession by the husband of any property, ancestral or self-acquired.

The widow of a deceased co-parcener has a right of maintenance against the surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners. This right to maintenance does not constitute in itself a charge, though it may be enforced against a transferee of joint family property under the circumstances set out in S. 39, Transfer of Property Act. Where it is necessary to preserve this right effectually it may (by proper proceedings) be made a specific charge on a reasonable portion of the joint family property—such portion not exceeding her husband's share therein.

A person's debts must have priority over his widow's maintenance and a widow taking her husband's estate on the latter's death without male issue has no right of maintenance apart from her right of inheritance and administering the estate as heir. She takes only what remains after payment of her husband's debts. All debts which would bind the husband personally are

necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. A debt incurred by a person as surety is binding as a family debt upon his undivided son and *a fortiori* his wife cannot impugn such debt.

Where, therefore, in execution of a decree obtained by the creditor against his debtor in respect of an obligation incurred by the latter as surety the decree-holder attached a house and bought it himself in court auction and applied to be placed in possession and the debtor's representative, the widow, claimed that she had a right of residence and that she could not be ejected:—

Held:—that the widow had no right of residence in priority to the right of her husband's creditors to be paid out of the assets and to realize their dues out of the estate if not paid and that the surety debt was a family debt which would bind the widow and defeat her right of maintenance including residence.

Jayanti Subbiah v. Mangamma 270

Insolvency Act S. 23:—See LETTERS PATENT.

Judgment:—See LETTERS PATENT.

Lameness as a disqualification:—See HINDU LAW (1.)

Negotiable Instruments Act (XXVI of 1881) Ss. 30, 94, 98, (c) and (e) and 108—Contract Act S. 134—Notice of dishonor—Reasonable notice—Liability of drawer.

The general rule laid down by S. 30 of the Negotiable Instruments Act is that a drawer of a bill of exchange is bound in case of dishonor by the drawer or acceptor to compensate the holder provided due notice of dishonor has been given to or received by the drawer. Such notice must be given in the manner prescribed by S. 94 and within a reasonable time as required by S. 106. S. 98 (c) is an exception to the above general rule and the holder relying upon the exception must allege and prove that no damage could have been suffered by the drawer by reason of absence of notice, reasonable or otherwise. Where it was alleged that the drawer and acceptor were partners but the drawer did not draw the bill on behalf of himself and his partner and the holder gave notice to the drawer a year after dishonor.

Held, (1) that the notice was not reasonable.

(2) that section 98 (c) did not apply so as to dispense with notice to the drawer upon dishonor by the acceptor, the drawer's partner.

(3) that the drawer was not liable, there being no allegation that he could not suffer damage. The fact that the holder is barred by limitation from bringing a suit against the acceptor does not discharge the drawer from liability within the meaning of S. 134, Contract Act.

Ramaswamy Bhagavathar v. Sundararaja Chetti 268

Letters Patent, S. 12—Judgment—Indian Insolvency Act, 1848, S. 23—
Reputed ownership clause—Charge-holder—Notice—Suit upon charge—
Civil Procedure Code, Ss. 32, 279, 280, 333 and 372—Adjudication
after insolvency—Official Assignee, made party.

An order by a single judge dismissing an application by the judgment-creditor of an insolvent that a sum in the hands of the Official Assignee attached in execution of the decree obtained by the judgment-creditor against the insolvent be paid over to the judgment-creditor is a judgment within the meaning of Section 15 of the Letters Patent and is appealable.

Per *Arnold White, C. J.* —

A chose in action and especially one which is a debt due to the insolvent in his trade or business comes within the words "goods and chattels" in S. 23 of the Indian Insolvency Act, 1848.

The English Bankruptcy Acts and the Indian Act compared.

The doctrine of reputed ownership does not apply unless there is a real owner as distinct from the apparent owner. The 'true owner' for the purposes of section 23 of the Indian Insolvency Act is the person who is entitled to determine the appearance of the beneficial interest.

An assignee in law or an assignee in equity, such as an equitable mortgagee, may be the true owner within the meaning of the section.

An instrument which merely creates a charge on future debts in favor of a person does not constitute the latter either an assignee in law or in equity. Such charge-holder is not the 'true owner' within the meaning of S. 23, Indian Insolvency Act, and the doctrine of reputed ownership has no application in such a case.

Where a notice is given by 'the true owner' preventing the party owing the debt from paying any one but the party giving the notice, such a notice takes the debt out of the operation of the section, that is, out of the order and disposition of the apparent owner.

Sec. 372, Civil Procedure Code, applies to the devolution of interest by operation of law or *in invitum*, and an Official Assignee in whom the rights of the insolvent are vested during the pendency of a suit can be properly made a party under Ss. 32 and 372, Civil Procedure Code.

Miller v. Budh Singh, I. L. R., 18 C. 43 dissented from.

The doctrine of *lis pendens* does not apply to a case where the subject-matter of the suit is not real property and is only moveable property or to a case where the devolution of interest is by operation of law and *in invitum*.

Per *Bhashyam Iyengar, J.* :—

The expression "true owner" occurring in S. 23 is not used in any technical sense but only as indicating the person who for all practical purposes is the real and substantial owner of the goods and chattels. A charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as the mortgagee thereof, and if either of them allows

the mortgagor or the person creating the charge, to remain in possession of the goods and chattels, under circumstances which will lead to his being 'reputed' as owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee.

A mere charge or hypothecation is treated as an equitable assignment.

The definition of charge by Day, J., in *Burlinson v. Hall*, 12 Q. B. D. 347 approved.

Tenant v. Trenchard, L. R. 4 Ch. App. 537 at pp. 543 and 544 referred to.

A notice by a person having a charge on a debt intimating his right to the debtor is sufficient to take the debt out of the order and disposition of the insolvent. *Tailby v. Official Receiver*, L. R. 13 A. C. 523 followed.

A suit by the holder of the charge against the person creating the charge to enforce such charge has also the same effect. *Burlinson v. Hall*, 12 Q. B. D. 347 referred to.

Where a person is adjudicated an insolvent pending a suit brought against him, which is purely an action 'in personam,' the Official Assignee is not a proper party. S. 372, Civil Procedure Code, has no relation to such a case as the section only relates to the case of an assignment pending suit of an interest in the subject-matter of the suit.

Miller v. Budh Singh, I. L. R., 18 C. 43 and *Chandmull v. Rames Soodery Dossee*, I. L. R., 22 C. 259 approved.

A charge-holder of a debt who has obtained a mere money decree is prevented by the principle laid down in S. 99 of the Transfer of Property Act from bringing the debt to sale in execution of a money decree but can bring it to sale only in enforcement of the charge.

An attachment after the vesting order of an amount in the hands of the Official Assignee representing a debt collected by him upon which a charge has been created in favour of the decree-holder must be released under S. 280, Civil Procedure Code.

Where a mortgagor or the person creating a charge becomes bankrupt pending a suit against him by the mortgagee or charge-holder upon such mortgage or charge, a decree for foreclosure or redemption in the absence of the trustee in bankruptcy or Official Assignee is not binding upon the latter.

Wood v. Surr, 19 Beav. 551 followed.

The doctrine of *Lis Pendens* has no application to personal property. *Wigram v. Buckley* [1894], 8 Ch. 483 followed.

Where, therefore, the plaintiff got a document which purported to mortgage all the mortgagor's stock-in-trade, existing and future debts, &c., but there were no words transferring to the plaintiff the ownership or any interest in the chattels and the ownership and the right to possession was reserved by the mortgagor, the plaintiff having only a right to inspect the books of account, &c., but having no right to take possession and he brought a suit upon

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his mortgage against the mortgagor who was adjudicated an insolvent pending suit and, without making the Official Assignee a party, obtained a decree against the insolvent and in execution attached a sum in the hands of the Official Assignee representing a debt due to the insolvent and collected by the Official Assignee but to which the plaintiff had a right under his document.

Held (1) that the document created only a charge in respect of the goods and chattels comprised under it,

and (2) that the plaintiff was not entitled in execution of his decree against the insolvent to get the sum in the hands of the Official Assignee.

Per *Arnold White, C. J.*—The plaintiff has the rights of a secured creditor in the insolvency and will be entitled to enforce those rights if he adopts the proper procedure.

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Lis Pendens.—See **LETTERS PATENT.**

Notice of dishonor.—See **NEGOTIABLE INSTRUMENTS ACT.**

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Revision Power of High Court when Jurisdiction not vested exercised.—See **CIVIL PROCEDURE CODE (5).**

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Malicious Prosecution—Information to Police—Police investigation—Police Search—Small Cause Nature—Civil Procedure Code, S. 586.

A suit for damages for trespass in that the defendants wrongfully caused the plaintiff's house to be searched by the Police is a suit of small cause nature; and no second appeal lies under S. 586, C. P. C.

Where the information was given by the defendants to the Police and the latter made a search in the course of their investigation preparatory to a prosecution before a Magistrate, no action for malicious prosecution is sustainable against the defendant though he may be guilty of trespass

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Execution of Decree—*Application in accordance with law—See LIMITATION ACT.*

High Court Circular—Private Vakil, when allowed to appear in Court—*See PRACTICE*

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Hindu Law—Revocation of will—Maternal grand-father's property—Estate taken by daughter's sons, nature of—Rights of Survivorship—Obstructed inheritance—Joint dealing—Printing of Records in Privy Council Appeals.

Actual destruction or a formal revocation in writing of a will made by a Hindu in the mofussil is not essential to constitute revocation. *Pertab Narain Singh v. Subba Koer*, L. R. 4 I. A. 228 referred to.

The estate taken by a daughter's sons is in the nature of ancestral property though in the hands of the grandfather it was self-acquisition

The doctrine is not universally true that persons succeeding to obstructed inheritance take as tenants in common and not as joint tenants with rights of survivorship.

Members of a joint family succeeding to self-acquired property take it jointly.

Where, therefore, two sons of a daughter living together as members of a joint family succeeded to the estate of their maternal grandfather and one of them died without leaving any issue but his widow, daughters and surviving brother.

Held, that the surviving brother took by survivorship the share of the deceased brother to the exclusion of the latter's widow.

Jasoda Koer v. Sheo Pershad Singh, I. L. R., 17 C. 33 } overruled
Saminatha Pillai v. Thungathannai, I. L. R., 19 M. 72 }

Obiter :—Property inherited from the maternal grand-father by his daughter's two sons may be treated as joint by course of conduct.

The course adopted in this case of printing documents wholly unnecessary and swelling up the record strongly disapproved.

Venkataramanayamma v. Appa Rao, J L R, 20 M 207 reversed.

Raja Chelikan Venkayamma v. Raja Chelikan Venkataramanayamma. 209

Limitation—*Acknowledgment—Effect of application for extension*
—See STAMP ACT.

Limitation Act—Art. 179.

Limitation Act, Art. 179—Civil Procedure Code, S. 232—Application in accordance with law.

A person who becomes entitled under a decree to realize the amount due under another decree, is a transferee under S 232, C. P. C., and is the only person who could have applied for execution of the latter decree. Such application is one in accordance with law though the transferee is subsequently held to have no title and the application has the legal effect of saving the bar and enures in favor of all persons entitled to execute the decree.

Steepada Brahmayya Pantulu v. Parasunamayya . . . 348

Malicious Prosecution—*Whether action lies for police search—See CIVIL PROCEDURE CODE (3)*

Practice—Private Vakil

High Court circular—Private Vakil

Where a High Court circular stated as a general rule that no person, not qualified as legal practitioner, should be permitted to act in any proceeding except to prevent a miscarriage of justice, a general order by a magistrate that no private Vakil shall appear in his court goes beyond the terms of the circular. But he will be acting in consonance with its terms if he states that he is not prepared to make any general exception in favor of any particular individual.

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Promissory Note not payable to order—*Assignment of—See STAMP ACT.*

Stamp Act—Ss. 35, 36

Stamp Act Ss 35 and 36—Civil Procedure Code Ss. 140 and 142—Insufficiently stamped document marked as exhibit—Promissory note not payable to order—Non-negotiable Promissory note—Assignment by separate deed—Acknowledgment.

Where a document purporting to be a promissory note is alleged to be insufficiently stamped but is marked as an exhibit under S. 140, C. P. C. and is not rejected under S 142, C. P. C., no objection could be taken having regard to S. 36 of the Stamp Act that it is not admissible in evidence on the ground that no penalty can be levied under S. 35 of the latter Act.

An extension of time granted by the creditor upon the written application of the debtor will amount to an acknowledgment and will operate to save the bar of limitation.

A promissory note which is not negotiable may be assigned by a separate deed without any endorsement and the assignee will be entitled to sue upon such promissory note.

Where the defendants executed a document to the president of a fund promising to pay the amount borrowed to the latter on demand three months after date and on default to pay jointly or severally interest according to the rules of the fund, but there was no provision that they would pay to the order of the president —

Held that the document was a promissory note which was, however, not negotiable.

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Suit of Small Cause nature—See CIVIL PROCEDURE CODE (3).

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Arbitration Reference.—Partnership Suit.—See PARTNERSHIP.

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1. Civil Procedure Code—Ss. 2, 365, 368, 540 and 622.

Civil Procedure Code, Ss. 2, 365, 368, 540 and 622—Succession Certificate Act, S. 16—Order dismissing suit as abated—Decree—Order striking out representative—Revision—Objection to legal representative when, to be raised—Court's duty on representative being brought on record.

An order dismissing a suit as abated is a decree from which an appeal and a second appeal lies.

Subbayya v. Saminadaya, I. L. R., 18 M. 496, followed.

An order passed by the District Judge dismissing an appeal from the order of the Munsif directing the name of the representative already brought on the record to be struck out is liable to revision under S. 622, C. P. C.

An objection that a person is not the legal representative of the deceased plaintiff must be taken at the earliest opportunity and before the person's name is entered on the record as the legal representative. When once the name of a person is entered on the record under S. 365, C. P. C., in the place of the deceased plaintiff as the latter's representative, the court is bound to proceed with the suit. A widow, holding a succession certificate for the debt alleged to be due to her husband is alone entitled to bring a suit for such debt and to recover the same. If her husband had brought the suit and died, the widow, as holder of the succession certificate, will also be entitled as of right to prosecute the suit of her husband.

Where, therefore, the deceased plaintiff brought a suit for the recovery of a debt and pending the suit died issueless and, his widow applied to be brought on the record within the time allowed by limitation, as representative of the deceased plaintiff and she was so brought on the record, and it appearing in the course of the trial that the deceased left an undivided brother who, however, disclaimed all interest and expressed his willingness to join and the defendant objected that the widow was not the proper legal representative—

Held (1), that the objection was too late and that no order for abatement could be passed after the widow was once entered on the record;

(2), that the widow holding a succession certificate was the only person who could represent her husband and continue the suit for the debt in question.

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2. ————— **S. 43.**—*See LANDLORD AND TENANT;*

3. ————— **Ss. 233, 246.**

Civil Procedure Code, Ss. 233, 246.—*Cross-decrees—Notice of assignment.*

Where there are cross-decrees in suits between the same parties, the decree for a smaller amount becomes incapable of execution under S. 246, C. P. C., and the decree for the larger amount, less the decree for the smaller amount is alone capable of execution. The decree for the smaller amount was subject to the equities under S. 246.

S. 246 is applicable to a case where the cross-decrees are passed by the very court whose duty it is to execute them and neither has been transferred for execution to another court, distinguished.

Where a decree is assigned the assignment takes effect against the judgment-debtor only on notice to the latter and the assignee takes it subject to the equities attaching to such decree under S. 246. *Vide* S. 233, C. P. C.

Where, therefore, there was a decree against S., and the decree-holder assigned it to the appellant, but before the assignment was perfected by notice, S. obtained a decree for a larger sum against appellant's assignor:—

Held, (1) that the appellant took the assignment subject to the equity attaching to the decree under S. 246, C. P. C.

(2) that the appellant could not execute the decree assigned to him against S.

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4. ————— **S. 283.**

Civil Procedure Code, S. 283.—*Claim—Judgment-debtor—Notice—Party to order.*

An order under S. 283, C. P. C., passed on a claim petition under S. 278, C. P. C., does not necessarily bind the judgment-debtor unless notice is given to the debtor. If he is not a party to such order he is not bound by the rule of one year's limitation prescribed under Art. 12 of the Limitation Act.

Netietom P. Damodren Nambudry v. Tayambarry Parameshwaran Nambudry doubted.

Sardhari Lal v. Ambika Pershad, referred to.

Moidin Kutty v. Kunhi Kutty Ali ... 411

5. ————— **S. 368.**—*See INCOME-TAX ACT S. 30.*

6. ————— **S. 375.**

Trustee—Worshippers—Persons for whose benefit institution founded—Inquiry—Decree of first Court—Compromise by trustee—Giving up rights under first decree—Lawful agreement—Civil Procedure Code, S. 375.

The principles which govern the regulation of religious trusts in England by the Court of Chancery will *mutatis mutandis* govern religious trusts in this country.

Where an institution exists for the purpose of religious worship, but the exact form of worship or the class, for whose benefit it was established, cannot be discovered from the instrument creating the trust (or there is no instrument at all), the court can find no other means of deciding those questions than through the medium of an enquiry into what has been the usage of the worshippers in respect thereto and, if the usage is a lawful one, it is the duty of the court to support that usage on the suit, legally instituted, of any person interested. *Attorney-General v. Pearson*, 17 R. R. 101 approved.

It is not in the power of managers of the institution to alter the purpose for which it is founded or to say to the worshippers that the managers have changed their opinion and that the worshippers should not come to the place of customary worship unless they conform also to the alteration.

It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is, in our opinion, guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the court to establish it.

Where, therefore, the Raja of Ramnad as trustee of the Kamuthi temple brought a suit for a declaration against the Shanars that they were not entitled to worship and for injunction and for damages and obtained a decree, and from that decree the Shanars appealed, and pending such appeal the trustee and Shanars compromised, by which compromise the trustee gave up all the right under the decree and some of the worshippers and persons admittedly interested were on application made parties to oppose the compromise:—

(1). *Held*, that the compromise by the trustee was not *bona fide* and not lawful within the meaning of Section 375, C. P. C.

(2). That the decree of the lower Court does not cease to be binding upon the parties by the mere fact of appeal, though the pendency of the appeal opens the whole question for the appellate Court.

(3). That a trustee giving up the right under the decree under appeal will be guilty of breach of trust.

Rajah M. Bhaskara Sethupathi and Irulappa Nadan v. Narayanasamy Gurukkal ... 360

7. S. 411.

Civil Procedure Code, S. 411—Stamp fees payable to and recoverable by Government—Subject-matter—First charge.

The amount due to Government as stamp fees and recoverable by Government upon the success of the pauper plaintiff in the suit is a first charge upon the subject-matter of the suit under S. 411, C. P. C., and a purchaser of the property forming a portion of the subject-matter of the suit at a sale held for realising the amount due to Government will get a free title as against a subsequent purchaser of the same property in execution of the decree obtained against the pauper or his estate for debts due by him.

Kunhunda Umma v. Valoth Assenar... ... 405

8. ————— S. 437.

Civil Procedure Code, S. 437—Trustee and Cestui que trust—Compromise by trustee in appeal—Right of beneficiaries to intervene.

Where a trustee is wholly uninterested in a contest relating to the trust or is adverse to the interest of the beneficiaries, the latter will be allowed to intervene and be given an opportunity of resisting the contest.

Clagg v. Rowland, L. R. 3 Eq. 373; Payne v. Parker, 1 Ch. App. 324.

Where parties are allowed to intervene in an appeal, they should be joined as parties to the suit and not to the appeal.

Where, therefore, the Raja of Ramnad, the hereditary trustee of the Kamuthi temple, sued for a declaration that the Shanar defendants were not entitled to enter such temple and obtained a decree in the first court and pending an appeal by the Shanars, made a compromise under which he virtually gave up all the rights under the decree, and the petitioners, the beneficiaries interested in the temple, applied to be made parties for opposing the compromise :—

Held, that they were proper parties to intervene and it was not necessary for them to show that the trustee collusively entered into the compromise.

Narayanasaamy Gurukkal &c. v. Irulappa 355

9. ————— S. 522.—See RELIGIOUS ENDOWMENTS ACT (2).

Charter—S. 29.—See CRIMINAL PROCEDURE CODE S. 145.

1. Compromise by Trustee in Appeal.—See CRIMINAL PROCEDURE CODE (8).**2. ————— See CRIMINAL PROCEDURE CODE (6).****1. Criminal Procedure Code—Ss. 145, 526.**

Charter Act, S. 29, Criminal Procedure Code, Ss. 145 and 526—Possession case—High Court's power of transfer.

A case under S. 145 of the Criminal Procedure Code is a criminal case and the High Court has power to transfer the same to another Magistrate under Criminal Procedure Code, S. 526, and Charter Act, Cl. 29.

Arumuga Sengundan Petitioner . . . 391

2. —————, S. 195, Clause (3).

Criminal Procedure Code—Granting of sanction—Prima facie case—Reasonable chance of conviction.

The granting of sanction under S. 195, cl. 3 of the Criminal Procedure Code, is not a mere formal matter, and before sanction can be granted, it is necessary for the Magistrate granting the sanction, to consider the evidence and decide as to whether there is a *prima facie* case and any reasonable chance of conviction being contained.

Abboo Chetty v. Kuppusami Chetty 392

3. —————, S. 198.

Criminal Procedure Code, S. 198.—Defamation—Person aggrieved—Statement against subordinate officers—Superior officer, how aggrieved.

The President of a Municipality is not a 'person aggrieved,' by the defamation of his subordinate officers within the meaning of S. 198, Criminal Procedure Code. Statements of specific acts of negligence on the part of the Health officer and the Subordinate officers of the Health Department are not defamatory of the complainant the President of the Municipality, merely because he has a control over the Health department.

Beauchamp v. Sir George Moore ... 413

Cross Decrees—Effect of Assignment on set off—*See* CIVIL PROCEDURE CODE (8).

Damages—Measure of, Nominal and substantial. *See* Principal and Agent.

Darkhast rules.—

Darkhast Rules—Regulation VI of 1803, S. 9 and Regulation VII of 1828, S. 3—Executive Act—Delegation of power—Scope of authority—Rules prescribing only procedure—Appeal to superior officer—Validity of grant consultation of Municipal Council—Grant vitiated by fraud, &c.—Appeal to Divisional Officer—Collector's order on appeal—Fiction of law.

Per Moore, J.—Under para 9 of the Standing Order of the Board of Revenue, No. 470, dated 15th August 1893, in case of applications for house-sites within Municipal limits, the Municipality concerned must be consulted before the applications were considered.

This rule is not a mere idle formality though it may be open to the Tahsildar (the officer concerned in granting applications for house-site) to accept or reject the opinion given by the Municipal Council. A non-compliance with this rule is a fatal defect in the title of the grantee.

It is open to a Collector to set aside the order of the Tahsildar, his subordinate on the ground of grave irregularity in not complying with this rule. There is no question of a Civil Court setting aside the order.

Pervya Rayalu v. Rayalu Reddi, distinguished.

Semle :—Under the general powers of supervision given to a Collector under Regulation VI of 1803, sec. 9 and Regulation VII of 1828, S. 3, there is an appeal to such Collector against the order of a Tahsildar granting an application for house-site and it is open to the Collector to set aside such order if irregular.

Though the power of granting lands for house-sites might have been delegated by the Governor-in-Council to the Tahsildar, yet as the exercise of this power was at the same time subject to certain rules, a grant of house-site by the Tahsildar in violation of the rules is irregular and liable to be cancelled by the Collector, his official superior in all other respects.

Where an appeal was provided from the order of the Tahsildar under the Darkhast Rules to the Divisional Officer and the appeal was presented to the Sub-Collector, the Divisional Officer, but the latter officer asked the Collector for instructions for the matter and on the Collector passing an order on such letter of reference that the Tahsildar's order should be set aside.

the Sub-Collector issued a Takid to the Tahsildar cancelling the latter's the Collector and order :—

Held by Moor, J. :—That the order was substantially that of the Divisional Officer within the meaning of the rule as to appeals and that there was no irregularity on the part of the Divisional Officer in making a reference to getting his instructions.

Per Bhashyam Aiyangar, J. :— A power conferred by the Governor-in-Council on Tahsildars or Divisional Officers in regard to the disposal of Crown lands cannot be controlled by the Collector under Regulation II of 1803, S. 9, or under Regulation VII of 1828.

It is open to the Governor-in-Council by an executive act to subject the exercise of a power conferred by an executive act to the control of a superior authority, but in the absence of any such provision, a grant made by the Tahsildar is final and the Collector acts *ultra vires* in entertaining an appeal from the Tahsildar's order and in revoking the grant he has made.

Where the Tahsildar acts in excess of his authority in making the grant, the grant of course will not bind the Crown.

A distinction must be drawn between so much of the rules as are in the nature of a power of attorney defining the scope of authority and so much as are in the nature of instructions to such officers while exercising the power conferred upon them.

A rule which has the effect of delegating the power of the Governor-in-Council solely to the Tahsildar and enjoins the latter that in acting within the scope of his authority, he should consult the Municipal Council and either adopt or reject its advice is one relating to the procedure to be adopted by the agent and therefore a grant made by the Tahsildar without consulting the Municipal Council is nevertheless valid as being within the scope of the agent's authority.

But if the rule should provide that no grant should be made by the Tahsildar without the previous sanction of the Municipality would amount to a delegation by the Government not to one officer but to him jointly with another body. *Periya Royalu v. Royalu Reddi* 1, followed.

If the grant is vitiated by fraud, misrepresentation, collusion, or mistake, it does not bind the Crown. An appeal allowed from the order of a Tahsildar to a Divisional Officer or not in the nature of a judicial act or appeal, and such Divisional Officer may consult and seek the advice of the Collector or of any other person and may also be implicitly guided by such advice.

But where the Collector issues his order, such order cannot be construed as that of the Divisional Officer and cannot be construed as a mere advice especially in a case where on the faith of a grant made by a public servant in the discharge of his duty, persons have invested labour and expense and made considerable improvements.

A fiction of law may be resorted to when calculated to further the ends of substantial justice and not otherwise.

Sappani Asari v. Collector of Coimbatore 417

Decree—Order of Abatement.—See CIVIL PROCEDURE CODE (1).

Defamation of Subordinate Officers—Superior Officers no right to complain—See CRIMINAL PROCEDURE CODE (3).

Gift by Husband to wife—Nature of Estate.—See HINDU LAW.

Gift, Effect of, on death of donor before Registration.—See REGISTRATION.

Grant of Land for House sites.—Validity of.—See DARKHAST RULES.

High Court's power of Transfer, Possession Case.—See CRIMINAL PROCEDURE CODE.

1. Hindu Law—Gift of grand-father.

Transfer of Property Act, S. 123—Onus on plaintiff to show invalidity—Gift by grandfather—Grandson not in existence—Acquiescence by father—Long possession—Prescriptive title—Grant by a person to his wife—Nature of estate.

The plaintiff who impeaches a gift as invalid under the Transfer of Property Act (not being in writing registered as required by S. 123) must show that the gift was made at a time when the Transfer of Property Act was in force.

Where a gift of ancestral property is made by the grandfather to his wife and is acceded to by the son it cannot be questioned by a grandson not in existence at the date of the gift.

A gift by a husband to the wife does not confer merely a life-estate but the limited estate of a female known to Hindu Law.

Obiter:—Possession held for over the statutory period under a title found to be invalid or unfounded will give the possessor a prescriptive title.

Kone Goundan v. Bola Naicken 387

2. —————Manager's Contract—Other members not parties—See SPECIFIC PERFORMANCE.

Income-tax Act II of 1886 S. 30.

Civil Procedure Code, S. 366—Income-tax Act (II of 1886), S. 30—Probate Act, S. 88—Sale for arrears of Income-tax—Effect and incidents of,—Death of defendant—Legal representatives—Person brought on record—Right of representation—Lis pendens.

S. 30 of the Income-tax Act has not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income-tax. Its effect is simply to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890 to the recovery of arrears of income-tax.

A sale by the Collector for arrears of income-tax under S. 30 of the Income-Tax Act II of 1886 can, as in the case of an Abkari sale, affect only the defaulter's interest in the property sold and will not pass the property to the purchaser free of incumbrances.

Ramachandra v. Pitchaikanni, followed.

Under S. 368 of the Civil Procedure Code, a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters upon the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and a decree passed in such suit will in the absence of fraud or collusion bind the estate though the person entered on the record is not the true representative or is only one of several representatives.

A person prosecuting or defending a suit of a deceased party will be accountable to others who like himself are also the legal representatives or to the true legal representative.

A purchaser in a sale for arrears of income-tax of the interest of a defaulter's representative is a voluntary purchaser and is not an assignee 'in invitum' like the Official Assignee, and is, therefore, affected by the doctrine of *Lis pendens*.

Wood v. Surr, 19 B. 551 and *Punithavelu Mudaliar v. Bhashyam Aiyangar*, I. L. B., 25 M. 49, distinguished.

Such a purchaser is, therefore, bound by a mortgage decree and a sale in pursuance of such decree extinguishes the purchaser's equity of redemption. *Kunhi Umah v. Ahmed*, I. L. B., 14 M. 491, followed.

Where, therefore, a mortgagee brought his suit to enforce the mortgage as against the mortgagor and pending the suit the latter died leaving 5 persons as legal representatives and only one of them was brought on the record as legal representative and a decree obtained and the interest of one of the representatives not so brought on the record was sold by the Collector for arrears of income-tax and the mortgage decree not being satisfied, the mortgage-decree was executed and the plaintiff became auction-purchaser:—

- Held* (1), that the decree bound even the representatives not brought on the record;
- (2), that the purchaser in the revenue sale was affected by the doctrine of *Lis pendens*;
- (3), that the purchaser in execution of the mortgage-decree obtained a valid title to the whole property.

Kadir Mohideen Marakkayar v. Muthukrishna Aigar ... 368

Landlord and Tenant.

Civil Procedure Code, S. 43—Landlord and tenant—Shells dug up by tenant—Property in shells—Wrongful conversion.

An agricultural tenant is not entitled to the shells dug up by him out of the earth in the absence of a local custom. The property in such shells is in the landlord and not in the tenant.

Tucker v. Linger, and *Elwes v. Briggs Gas Company*, followed.

Quære:—Whether the tenant will be justified in digging up shells in cultivating the land properly and in a husbandman-like manner.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Kasinatha Aiyar	...	...	...	Appellant* (Plaintiff and decree-holder- purchaser, Petitioner).
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v.

Uthumansa Rowthen and others	...	...	...	Respondents (Defendants— Judgment- debtors, 12, 13, 14).
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Civil Procedure Code, Ss. 244, 318 and 335—Mortgage decree—Purchase—Suit on a subsequent mortgage—Sale subject to prior charge—Purchase—Obstruction to possession—Claim allowed—Appeal—Matter relating to execution—Private purchase from mortgagor after decree for sale—Obstruction—No appeal.

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An order determining the right to possession of properties as between the mortgagee-decree-holder-purchaser and a party to the suit, is an order passed in execution between the parties to the suit within the meaning of section 244, C. P. O. and hence an appeal will lie against such an order.

A similar order as between the decree-holder purchaser and one who had purchased the property from the mortgagor judgment-debtor after the decree for sale is not an order between parties to the suit or their representatives within the meaning of S. 244, C. P. O., and hence no appeal lies against such an order.

Where in a decree for sale upon a mortgage, the rights of purchasers in execution of a decree for sale upon a prior mortgage were reserved and properties were sold subject to a charge in their favour:—

Held, that upon the proper construction of the decree the prior purchasers were entitled to remain in possession until redeemed and that the subsequent purchaser was not entitled to recover the properties from them without paying the amount of the charge in their favour.

Appeal from the order of the District Court of Tanjore, dated 28th August 1900, passed in C. M. A. No. 635 of 1900, presented against the order of the District Munsif of Kumbakonam,

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in M. P. No. 561 of 1900 ; in O. S. No. 308 of 1897 on the file of the District Munsif's Court of Shiyali.

T. V. Seshagiri Aiyar for appellant.

P. R. Sundara Aiyar, K. Srinivasa Aiyangar and T. R. Venkatarama Sastri for respondents.

The Court delivered the following

JUDGMENTS :—*Moore, J.*—Nammalwar Chetti in whose favour a mortgage had been executed under a document, dated 25th June 1884 with respect to the properties to which the present appeal relates, brought a suit (O. S. No. 172 of 1887) on that mortgage, and having obtained a decree brought the property to sale in 1890 and purchased certain of the items of property while others were bought by Saminada Tevan. Of the several items of property thus purchased, Nos. 8 to 12 were sold by the purchasers to the brother of Uthumansa Rowthen and Ahammad Rowthen, the 1st and 2nd respondents, while items 13 and 14 were sold by Nammalwar to Saminada and by him to the father of the 3rd respondent. The 1st, 2nd and the father of the 3rd respondent were duly put in possession of the items of property purchased by them. In 1897 Kasinatha Iyer, the present appellant, brought a suit (267 of 1897 on the file of the District Munsif of Kumbakonam) on a mortgage document, dated the 8th July 1884, which had been executed in his favour with respect to certain of the properties entered in the mortgage deed of the 25th June 1884 in favour of Nammalwar. The present 1st and 2nd respondents were respectively the 12th and 13th defendants in that suit, while the father of the 3rd respondent was the 16th defendant. The plaintiff (present appellant) obtained a decree, in which it was directed *inter alia* that the present respondents 1, 2 and 3 should pay him a sum of over Rs. 1,500, and that, in default of payment, items 8 to 14 of the property mentioned in the mortgage document of the 25th June 1884 together with other properties should be sold subject to the prior charge of Rs. 1,500 together with interest on the land under that mortgage. The present appellant, having purchased the land at the sale held in execution of the decree, attempted to get possession, but was obstructed by the 1st, 2nd, 3rd and 4th respondents. He accordingly presented a petition to the District Mansif under sections 318 and 335, C. P. C. The District Munsif having dis-

missed his petition, and the District Judge having on appeal declined to interfere, this appeal against the appellate order has been preferred here.

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In his petition to the District Munsif the appellant stated that the 4th respondent was in possession of a thatched house which belonged to the defendants 1 to 7 in O. S. No. 267 of 1897, but which the 4th respondent was living in under a right obtained from them. It was alleged that these defendants had instigated the 4th respondent to prevent the appellant getting possession of the house. The 4th respondent did not appear before the District Munsif and the question as to the house which he is in possession of is not alluded to in his order. The District Judge held that the order relating to him must be considered to have been passed under section 335, C. P. C., and that there was consequently no appeal against that order. The District Judge appears to be right. The 4th respondent claims under an alienation made by the defendants 1 to 7 in O. S. No. 267 of 1897 after the date of the decree in that suit. As this respondent is not a judgment-debtor, and as it has not been shown that he has resisted the attempt of the appellant to get possession on behalf of any one of the judgment-debtors, it must be held that his case comes under section 335 of the C. P. C., and that there was consequently no appeal against the order of the District Munsif in so far as it related to him.

The District Judge has further held that there is no appeal against the order of the District Munsif in so far as it affects respondents 1, 2 and 3. I cannot uphold this decision. Even if the plaintiff, the purchaser of the lands, were not the decree-holder, I am decidedly of opinion that, following the decisions *Prosumo Kumar Sanyal v. Kali Das Sanyal*, I. L. R., 19 C. 683; *Ishan Chandra Sirkar v. Beni Madhus Sirkar*, I. L. R., 24 C. 62, and *Dwar Buksh Sirkar v. Fatik Jali*, I. L. R., 26 C. 250, he must be held to be a representative of the judgment-creditor. In the present case the purchaser is the decree-holder, the plaintiff in the suit. It would be impossible to hold that having been a party to the decree he ceased to be a party because he purchased the property at the sale held in execution. The only point therefore to be decided is whether the question as to which of the parties to the present proceedings are at issue, is one relating to the execution, discharge or

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satisfaction of the decree. (Section 244, C. P. C.) The present application, being one by the purchaser of the lands to be put in possession, must be held to be a step in aid of execution (*vide* *Moti Lal v. Makund Singh*, I. L. R., 19 A. 477; *Sariatoola Moolla v. Raj Kumar Roy*, I. L. R., 27 C. 709 and *Lakshmanan Chettiar v. Kannammal*, 24 M. 185) and such being the case, the question at issue is clearly one relating to the execution of the decree and as has already been pointed out, it is between the parties to the decree. The order of the District Munsif was therefore one passed under section 244, C. P. C., and an appeal lay from it.

On the merits I agree with the District Judge. The direction in the decree in O. S. No. 308 of 1897 was that the property should be sold subject to the prior charge on it of the amount due under the mortgage document of the 25th June 1884. It follows that the respondents 1, 2 and 3 cannot be ousted till the total amount due under that document is paid off. This second appeal is dismissed with costs.

Bhashyam Aiyangar, J.:—I am also of the same opinion. The decree-holder in execution of his decree which directed the sale of certain properties (mortgaged to him by defendants Nos. 1 and 3 and the ancestors of defendants Nos. 2, 4, 5, 6 and 7) subject to a prior charge thereon of Rs. 1,500 (together with interest) in favour of the 12th, 13th and 16th defendants became the purchaser and now seeks to recover possession of the properties purchased under sections 318 and 334, C. P. C., from the 12th and 13th defendants and the legal representatives of the 16th defendant. The question that is raised is whether, under the terms of the decree, he is entitled to be put into possession without paying the amount of the prior charge. The defendants dispossessed being left at liberty to bring a separate suit for enforcing the charge in their favour. In my opinion, the question thus raised between the decree-holder purchaser and the said defendants relates within the meaning of section 244 (c), C. P. C., to the execution or enforcement of the decree against those defendants, and the order appealed against is not the less an order under section 244, because it is also passed under sections 318 and 334, neither of which is specified in section 588.

I am clearly of opinion that, according to the right construction of the decree, the decree-holder-purchaser cannot execute or enforce the decree against the defendants in possession by ousting them without redeeming the prior charge.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Akkanna and another	...	...	Appellants *
			(3rd and 24th
			Defendants).
v.			
Venkiah and others	...	...	Respondents
			(1st and 2nd Defts.
			and legal reprs. of
			4th Defendant).

Hindu Law—Widow—Husband's estate—Income—Accretion—Ownership of widow—
Presumption—No difference in enjoyment of purchased land and widow's estate.

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There is no presumption that a widow intends to incorporate the unspent income of her husband's estate or the property purchased therewith with that estate. In the absence of evidence to the contrary, the widow's absolute right to the income or the property and the consequent power of alienation must prevail.

Appeal from the decree of the District Court of Godavari in
O. S. No. 4 of 1899.

V. Krishnaswami Aiyar for appellants.

P. R. Sundara Aiyar and *K. R. Subrahmania Sastri* for 1st
to 4th respondents.

The Court delivered the following

JUDGMENT:—The main facts are sufficiently stated by the District Judge. This appeal is preferred by defendants 3 and 24 against so much of the decree as awards to the plaintiffs 5/9th share in certain inam lands, which are partly in possession of the 3rd defendant, and partly in possession of the 24th defendant. The District Judge decided the case on the footing that Parvatanma inherited certain property from her husband, and with the income

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thereof acquired the lands in question in 1864 on a usufructuary mortgage for 52 years from certain Mahomedans who were the owners thereof: The usufruct was to extinguish the debt at the end of the 52 years. The District Judge further held that Parvatamma assigned in 1877 under Exhibit K the unexpired portion of the term of the mortgage to Ramiah, the brother of the 3rd defendant, and received a portion of the sum named therein, viz., Rs. 290, as consideration for the assignment.

The questions argued in support of the appeal are, (1) that there is no proof that the properties in question were acquired in mortgage by Parvatamma or that she alienated the same to the appellants; (2) that the appellants respectively purchased portions of the property in 1893 from the Mussalman owners from whom they held leases of an earlier date; (3) that even if the property was so acquired by her and alienated to the appellants, the plaintiffs as reversionary heirs cannot impugn the alienation; and lastly, (4) that Parvatamma's husband Bulli Venkanna predeceased his father, Venkatrayudu, and that therefore she was not entitled to inherit from her father-in-law the property from the income of which the mortgaged property was acquired, and that therefore she acquired an absolute right to such property, not merely a widow's estate. It is unnecessary to consider the question of law raised in the last mentioned ground of appeal, as we fully concur with the District Judge in his finding that Bulli Venkanna did not predecease his father. As regards the proof of the mortgage, the instrument is not forthcoming, but according to Exhibit K it ought to be in the possession of the family of Ramiah, and we think that Exhibit K, which is a registered instrument, is sufficient evidence, at any rate, against the 3rd defendant, and there is also some oral evidence in proof of the mortgage. Though the assignment, Exhibit K, was in the name of Ramiah alone, there is evidence that the lands, or, at any rate, the income thereof, was enjoyed in common by Ramiah and his younger brothers, the 2nd and 3rd defendants, the eldest brother, 1st defendant, having become divided from them prior to 1877. The 3rd defendant, no doubt, got a sale deed, Exhibit 4, for the property in his possession from the Mussalman owners in 1893. This sale would confer on him only the equity of redemption of the land, and it may be that his brothers have no right in such equity of redemption, but it is not inconsistent with

the plaintiff's case that 3rd defendant was in possession of the Akkanna land as assignee of the mortgage in favour of Parvatamma. There is ^{V.} Venkiah. no proof of 3rd defendant's plea that his possession prior to 1893 was as lessee directly from the Mussalman owners and no cowle is produced in support of the plea. His possession, therefore, must be traced to the alienation made by Parvatamma under Exhibit K, and if Parvatamma had no absolute power of disposal of the lands which she held as mortgagee, it is not contended or established that the alienation under Exhibit K was for a purpose binding on the reversioners. As regards the land in the 24th defendant's possession, we find it difficult to concur with the District Judge either that it was comprised in the moiety of the mortgaged land in respect of which moiety alone Parvatamma's right was established in the suit referred to in Exhibit K, or that 24th defendant derived his title thereto from the transferee under Exhibit K.

The 24th defendant is not a member of Ramiah's family, and there is evidence that the land had been previously in the enjoyment of his father-in-law. The only evidence is that the land is part of the Mussalman's inam land, but there is nothing to show that it is included in the moiety adjudged to Parvatamma. On this ground, if on no other, it would be necessary to allow the appeal so far as this land is concerned. As regards the third contention, we are unable to uphold the finding of the District Judge that the property acquired by Parvatamma, on a usufructuary mortgage for a long term of years, by means of the income derived by her from the jiroiyati lands inherited from her husband should be held to form an accretion to her husband's estate and that her alienation of the same does not bind her reversioners. The District Judge relying upon the decisions of the Privy Council, reported in *Isri Dutt Koer v. Hansbutti Koerain*, I. L. R., 10 C. 337 and *Sheolochun Singh v. Saheb Singh*, I. L. R., 14 C. 387, holds that it was really Parvatamma's intention to treat the mortgage as an accretion to her husband's property, and that there is nothing to show that she made any distinction between the lands acquired by her on mortgage and the jiroiyati lands inherited by her from her husband. He considers that the recitals made in the transfer deed Exhibit K that her occupation was 'living on her husband's property' and that she alienated the property for the purpose of discharging her debts, show that she treated the property acquired on mortgage as accretion to her

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husband's property. The property comprised in the transfer deed is only the mortgage property and there is no recital as to the nature of the debt. The occupation of the executant is generally mentioned in documents as required by the rules of the Registration Department, and the statement in the document that Parvatamma was living on her husband's property cannot possibly warrant an inference that it was her intention that the mortgaged property should form an accretion to the husband's estate. In our opinion, there is no evidence on the record either to show that Parvatamma intended thus to incorporate her property, or to show that she did not intend so to do. The question as to the power of disposition which a Hindu widow has over property acquired by her out of the income from her husband's estate, or out of savings from such income, has to be determined solely with reference to general principles and judicial decisions, there being no texts of Hindu law bearing upon it. Mr. Mayne gives a summary of these decisions in paras 626—630 of his treatise on Hindu Law and Usage (6th edition), and it is unnecessary to refer here to any of the decisions on the subject prior to the decision of the Privy Council in *Isri Dutt Koer v. Hansbutti Koerain* (I. L. R., 10 C. 337, L. R. 10, I. A. 150) in which all the earlier decisions are reviewed and considered. While laying down clearly in that case that a widow's savings from the income of her husband's estate are not her stridhanam, and that if she made no attempt to dispose of them in her lifetime, it is undisputed that they follow the estate from which they arose, it was held that it was a question to be decided upon the facts of each case, whether such savings form an accretion to the husband's estate as distinguished from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. In that case the properties consisted of certain shares of land in which the husband was a shareholder to a large extent, and the purchase was made by the widows out of their savings within a short time after his death in 1857, and they made no attempt to alienate them till 1873, and even then "the object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession and give the inheritance to the heirs of one of themselves in preference to their husband's heirs." This was carried out by conveying to such heir part of the property

inherited from the husband and part of the property subsequently Akkanna
acquired by the widows. These circumstances in their Lordships' Venkiah.
opinion clearly established 'accretion to the original estate,' and
made the after—purchases inalienable by the widows for any pur-
pose which would not justify alienation of the original estate. In
Sheolochun Singh v. Sahab Singh (I. L. R. 14 C. 387) the
above decision was followed, and it was held that the purchased
properties were dealt with by the widows as accretions to their
husband's estate, and that the original properties and such accre-
tions were treated by the widows precisely alike in the deed of
gift which they executed in favour of the alleged adopted son. In
this case, no doubt, their Lordships observe that "where a widow
comes into possession of the property of the husband and
receives the income and does not spend it but invests it in the
purchase of other property," it must be taken *prima facie* to be the
intention of the widow to keep the estate of the husband as an
entire estate, and the property purchased as an accretion to
that estate. This was only a *dictum* which must be understood
with reference to the facts and circumstances of the case, which,
it was held, indicated that it was the intention of the widows to
keep the estate entire, and that the same should descend in one
line of succession. In *Soudamini Dasi v. Administrator-General
of Bengal* (I. L. R. 20 C. 433), the latest decision of the Privy
Council on the subject, the income which accrued on the estate of
the husband for a period of about 8 years subsequent to his death
and which was not disposed of by his will, came to his widow as
his heir-at-law, and she invested the same in Government securities
exceeding two lacs of rupees in value ; and after the lapse of about
20 years she disposed of the same as her own. It was held that
the money so invested by her belonged to her as income derived
from her widow's estate, and was subject to her disposition. With
reference to the contention raised in that case that the savings of a
Hindu widow must be presumed to have been made for the benefit
of her husband's estate, their Lordships observed as follows :—

"Without examining the precise result of the decisions, it
is sufficient to say that in this case there is no room for
any such presumption, for the *corpus* of the estate never came
to the widow but was taken by Shamacharan Mullick under
the will, and the income to which the widow succeeded

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was separated from it, and became, and was dealt with as, an entirely separate fund * * * * She did nothing to indicate an intention to make the fund received or the interest on it, part of her husband's estate which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs * * * * The fund in question was not in any sense received by Padmakumari (the widow) as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with Shama-charan Mullick, was her own absolute property, and she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs."

In the present case, as already stated, there is no evidence that Parvatamma ever indicated any intention to make the mortgaged property part of her husband's estate for the benefit of his heirs. The acquisition made by her out of the income of her husband's estate was not in the nature of an enlargement of that estate or of redeeming the same from an incumbrance or charge or in the nature of an appurtenance thereto; it was simply an investment, on a usufructuary mortgage, of her small savings over which she had absolute power of disposal, and it is difficult to see on what principle it is to be presumed that she thereby intended to part with her power of disposition for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. In the case of property inherited from the husband, it is not by reason of her intention, but by reason of the limited nature of a widow's estate under the Hindu Law, that she has only a limited power of disposition; but her absolute power of disposition over the income derived from such limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her

accounts, also claimed. The jewels have been sent to the defendant for sale. The finding of the Courts below was that the jewels were sent for sale but for the defendant's use and that the defendant wrongfully retained the jewels and refused to deliver them to the plaintiff. The Courts, however, gave the plaintiff a decree for the whole claim.

V. Krishnaswami Aiyar for appellant:—The District Munsif had no jurisdiction to decide the claim in regard to the jewels. The cause of action is wrongful detention or conversion of the jewels, which arose at Madras outside the jurisdiction of the District Munsif's Court and the defendant does not reside within his jurisdiction. Two causes of action may be joined only if they arose within the jurisdiction of the Court. See *Jiraju v. Purushotam*, I. L. B. 7 M. 171.

N. Subramaniam for respondent:—The defendant had a residence at Kottapatam also. The plaint shows that [*Bhashyam Aiyangar, J.*:—The plaint is not evidence in your favour, though it may be used against you. You anticipate the objection to jurisdiction in your plaint, and the defendant traverses the statement and takes an issue. There is no proof that the defendant resides at Kottapatam] the defendant was carrying on business at Kottapatam through his agent. (*Bhashyam Aiyangar, J.* That might have ceased at the date of the suit).

The Court delivered the following

JUDGMENT:—As regards the sum of Rs. 72-8-10, it appears that the contract between the parties was entered into in Kottapatam. The District Munsif of Ongole consequently had jurisdiction. As regards the sum of Rs. 780, we are of opinion that the District Munsif had no jurisdiction. The jewels regarding which this claim has arisen were either wrongfully retained or converted in Madras, and the suit regarding them consequently could not be filed in Ongole. The decree of the lower Courts will be modified

accordingly. The plaintiff (respondent) and defendant (appellant) ^{v.} Ethirajulu will pay and receive costs in proportion to the extent to which ^{v.} Sreeramulu. they have failed or succeeded.

The memorandum of objections not having been moved, it is rejected.

IN THE HIGH COURT OF JUDICATURE-AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Siva Panda ...	Appellant*
	(Resp. Deft.)
v.	
Jujisti Panda ...	Respondent
	(Petitioner
	Plaintiff).

Contribution—Joint decree—Payment by one—Contribution claimed against the other— Sivada Panda
Liability—Burden of Proof. Jujisti Panda.

Where one of two judgment-debtors against whom a joint decree for money was passed satisfied the whole decree, there is *prima facie* a right to contribution. It is for the defendant to show that as between the plaintiff and the defendant, the plaintiff should bear the whole debt or that the defendant was not equally liable with the plaintiff or that they were joint tortfeasors in such a sense as would negative the right to contribution.

Appeal under Section 15 of the Letters Patent from the judgment and order of Mr. Justice *Davies*, dated 18th July 1901 in C. R. P. No. 36 of 1901 preferred from the decree of the Court of the District Munsif of Aska in Small Cause Suit No. 386 of 1900.

The plaintiff and the defendant were both defendants in a previous suit in ejectment. In that suit, the defendants disclaimed all interest in the property which was the subject-matter of that suit. The plaintiff agreed to submit to a decree if the plaintiff in that prior decree would take a special oath and swear to a particular fact. The oath was taken, and the Court passed a decree making both the plaintiff and the defendant liable for mesne profits and costs. The plaintiff having discharged that decree brought this suit

Siya Panda v. Jujisti Panda. to recover by way of contribution half the amount so paid. On the defendant's plea that he was not interested in the previous suit and that the lands were enjoyed by the plaintiff during the faslis for which mesne profits were awarded, the District Munsif dismissed the suit. On revision, *Davies, J.* reversed the decision and decreed the plaintiff's claim holding that the District Munsif could not go behind the joint decree against both the plaintiff and the defendant. Hence this appeal under the Letters Patent.

V. Krishnaswami Aiyar for appellant.

T. R. Venkatarama Sastri for *P. S. Sivaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—In O. S. No. 156 of 1899 a decree was passed jointly against the plaintiff and the defendant in the present suit decreeing them to deliver to the plaintiff in the former suit certain lands and to pay him Rs. 43-15-10 on account of the profits of such land and Rs. 31-3-6 for costs of the suit. The defendant in the present suit did not appear and defend the former suit. In execution of the said decree the whole amount decreed with costs was recovered from the present plaintiff alone, and he now sues the defendant for contribution and claims payment of Rs. 41-3-2 being one-half of the amount realised from him. The defendant resists the claim on the following grounds.

(1). That the decree in O. S. No. 156 of 1899 was passed against him *ex parte*; (2) that he had no concern in that suit and that he appeared and stated so before certain commissioners appointed in that suit under the Indian Oaths Act to administer a special form of oath to be taken by the plaintiff therein by which oath the present plaintiff—the 2nd defendant therein—agreed to be bound; (3) that the present plaintiff put forward a false contention in that suit; (4) that the decree was passed against both the defendants therein in accordance with the oath taken by the plaintiff therein, and (5) that the mesne profits decreed related to Fuslies 1306, 1307, & 1308, and were received and enjoyed by plaintiff alone.

Upon these pleadings and with reference to the pleadings and judgment in the former suit, the District Munsif held that the defendant was not bound to contribute and dismissed the suit.

This decision seems to be based on the 1st, 2nd and 4th pleas ^{Siva Panda} raised by the defendant as above set forth. The above decision of ^{V.} the District Munsif was set aside in revision by *Davies, J.*, and a decree was passed in favour of the plaintiff as prayed for, on the ground that the District Munsif was wrong in going behind the decree which made the defendant jointly liable with the plaintiff and that being so, the plaintiff was entitled to claim contribution from the defendant for the moiety.

In our opinion the plaintiff has made out a *prima facie* case by the production of the judgment in the former suit and of the certificate of satisfaction thereof by him alone. It is immaterial that so far as the present defendant is concerned it was passed against him *ex parte*, and it was not competent to the District Munsif to go behind the decree in that case and hold that the foundation of the present action fails because the former suit was decided by the special oath of the plaintiff therein, and the pleadings in that suit show that the present defendant who did not appear and defend that suit had no interest in that case. Whether the judgment in that case was in fact and law right or wrong, it has become final and it is not now open to the defendant to contend that that suit ought to have been dismissed as against him, and no decree ought to have been passed holding him jointly liable with the plaintiff. In a suit for contribution by one joint judgment-debtor against another, the decree passed against them jointly in the former suit is conclusive, not only as between them on the one hand and the decree-holder, on the other, (who is no party to the contribution suit), but also as between the judgment-debtors *inter se*. It is not conclusive on the question of the liability to contribute or the extent of such liability, but it is conclusive in the sense that it is not open to the other party to contend that the former suit ought to have been entirely dismissed or that at any rate he ought not to have been held liable to the decree-holder therein or that the amount decreed was excessive or fixed on principles erroneous on the very face of the judgment. Without infringing the propriety of the judgment, it will of course be open to the party from whom contribution is sought, to plead and establish that as between the joint-debtors the plaintiff is solely liable to the debt or that he is not equally liable with the plaintiff or that both being joint-tort-

Siva Panda v. Jujisti Panda. feasons in a sense in which, on public grounds, the right of contribution is negatived, the suit is not maintainable.

The fifth plea raised in this case might, if established, have been a valid defence to this suit. Though in the former suit, both may have been rightly held jointly liable to the then plaintiff, yet if as between the plaintiff and defendant herein, the former alone received or enjoyed the profits for Fushies 1306, 1307, 1308, which were decreed in the former suit, the defendant cannot be called upon to contribute.

No plea having been raised against the maintainability of the suit on the ground that the plaintiff and defendant were joint-tortfeasors, it is unnecessary to consider how far the rule in the English case of *Merryweather v. Nixan* (8. T. R. 186) which Lord *Herschel* in *Palmer v. W and P. Steam Shipping and Co.*, (L. R. 1894 A. C. 318 at p. 324) felt bound to say did not appear to him "to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries" should be followed in India or to consider the extent to which it has been limited in England by the subsequent cases of *Adamson v. Jarvis* (4 Bing. 66), *Palmer v. W. P. S. Ship Co.*, (1894 A. C. 318) and *Burrows v. Rhodes and Jaunser* (1899, 1 Q. B. 816).

As regards the 5th plea, which if established might, as already observed, be a valid defence to the suit, it is not alleged that any evidence was tendered or rejected.

The appeal, therefore, fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Sivaswami Chetty and others ... Appellants*
(Defendants).

v.

Sevugan Chetty	...	...	...	Respondent (<i>Plaintiff</i>).
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Mortgage—Document intended to be executed by many—Execution by some—Refusal of others—Compulsory registration—Validity of Mortgage against executors—Chetty Proposal—Incomplete instrument—Intention of parties.

Where a document intended to be executed by more than one person is executed by one or some only others refuse to complete it, the question whether it is binding on those who have executed it is one of the intention of the parties to be gathered from the facts of each case.

Three undivided brothers in a Hindu family and the minor son of the eldest brother were the intended executants of a mortgage instrument. The eldest brother alone signed for himself and his son. The major portion of the consideration was prior bonds and notes, one of which was executed by all the brothers jointly and the rest were incurred by the younger brothers. Neither in the mortgage deed nor in the prior document was the eldest brother described as managing member. The creditor and the executant tried their best to persuade the rest to sign but they refused. On these facts:—

Held, that the document was not intended to bind the executants till all had signed and completed it and that it never went beyond the stage of an unperfected proposal.

Appeal from the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 68 of 1898.

P. R. Sundara Aiyar for appellants.

C. Sankara Nair and M. R. Krishna Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Bhashyam Aiyangar, J.*—Plaintiff sues on a hypothecation bond, Exhibit J, dated 31st October 1897, purporting to be made between the plaintiff on the one part and the 1st, 2nd and 3rd defendants as well as one Pothu Chetty, now deceased, on the other part, and to be executed by the 1st defendant for himself and for the 2nd defendant, his minor son. The 3rd defendant and the deceased Pothu Chetty are, as described in Exhibit J,

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the younger brothers of the 1st defendant. Exhibit J recites that the 1st and 3rd defendants and Pothu Chetty execute the document on their behalf respectively and the 1st defendant also on behalf of the 2nd defendant a minor.

The 1st defendant on behalf of himself and the 2nd defendant denied the execution by him of the hypothecation bond, and also contended that no suit could be brought upon the bond apparently on the ground that it was not completed. The 3rd defendant also denied the genuineness of Exhibit J, and contended that the loans recited in Exhibit J were not contracted for his benefit, and that even if Exhibit J were genuine, he was not liable to be sued thereon inasmuch as the 1st defendant did not execute the same on his behalf, or of the deceased Pothu Chetty, and that no suit could be brought on Exhibit J, as it was not completed, and neither he nor the deceased Pothu Chetty executed or agreed to execute the same. Both the 1st and 3rd defendants also alleged in their written statements that the 1st defendant was not the managing member of the family.

The Subordinate Judge found the Exhibit J to be genuine, and that the consideration therein recited was real and binding upon the family, and passed a decree in favour of the plaintiff against defendants 1, 2, 3 and the property hypothecated under Exhibit J.

Against this decree defendants 1, 2 and 3 have preferred Appeal No. 102 of 1900; and it is contended on their behalf that Exhibit J is not genuine, that a portion of the consideration for Exhibit J is not real, and that Exhibit J not having been completed, it cannot bind either the defendants 1, 2 and 3 jointly or any one of them.

I concur with the Subordinate Judge in holding that Exhibit J was signed by the 1st defendant and that the consideration for the mortgage bond, i. e., Rs. 5,470-0-0, was real and such as would bind the family. Negotiations were going on for some time between the defendants and the plaintiff in view to the plaintiff advancing a further loan and obtaining a mortgage bond for Rs. 10,000 from the defendants hypothecating all their property. Owing apparently to disagreement as to rate of interest the negotiations fell through; but the plaintiff being anxious to obtain security for the various

sums advanced by him on pro-notes mainly to the 1st defendant and partly to the 3rd defendant, and the 1st defendant too being desirous that the debts thus contracted by him should be undertaken by his brothers also, it was arranged between the plaintiff and the 1st defendant that Exhibit J should be executed by all the members of the family, which at that time was in an embarrassed state of circumstances. But as the remaining members of the family declined to sign Exhibit J, after it was signed by the 1st defendant, the 1st defendant refused to register the document so far as he was concerned by falsely denying its execution by him. The District Registrar after being satisfied that it was executed by the 1st defendant directed its registration. I am satisfied upon the evidence in the case, that Exhibit J was executed by the 1st defendant, and no ground has been made out for allowing the 1st defendant to re-open the settlement of accounts embodied in Exhibit J. But in my opinion, the appellant's contention that Exhibit J was intended both by the plaintiff and the 1st defendant to be executed by all the members of the family, and that it was not intended that the 1st defendant alone by signing it was to bind himself or in his capacity as managing member bind the whole family, is well founded. When a document is intended to be executed by several persons, but is executed only by some of them, the question whether it takes effect as against those who have executed it, notwithstanding that the rest have declined to join in the execution of the document, rests upon the intention of the parties. Without laying down as a general proposition that, whenever an instrument is drawn up making every member of an undivided Hindu family party to it by name, it will not take any effect if one or more of them do not join the rest in executing it. I am clearly of opinion that, under the circumstances of the present case, the only reasonable inference to be drawn as to the intention of the plaintiff and of the 1st defendant when he executed Exhibit J, is that it was to take effect only on the 3rd defendant and Pothu Chetty as joining in its execution. More than one half of the consideration for Exhibit J is the amount of the unregistered hypothecation bond, Exhibit D, dated 20th April 1896, which was executed not only by the 1st defendant but also by the 3rd defendant and Pothu Chetty. The pro-note, Exhibit G, for Rs. 700, which forms a portion of the consideration for Exhibit J, was

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—
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given by the 3rd defendant and Pothu Chetty and the pro-note Exhibit H for Rs. 100, also a part of the consideration for Exhibit J was given by the 3rd defendant only. Neither in Exhibit J, nor in Exhibit D, nor in any of the promissory notes, is the 1st defendant referred to as the managing member, and in fact not a single document has been produced which was executed by him as representing his branch of the family. Exhibit J clearly names each of the three brothers as a party to the document, and they are not even described as undivided brothers; and the 1st defendant is therein referred to only as representing the 2nd defendant. If Exhibit J is to be given effect to, as contended on behalf of the respondents as a mortgage bond executed by the 1st defendant as the managing member of his branch of the family, the result, so far as the 1st defendant is concerned, would be that he will be personally liable for the whole debt as also his share in the property mortgaged, and the shares of the brothers will also be liable only if the consideration for Exhibit J is proved to have been incurred for purposes beneficial to the family. If the brothers also join as party executants, the creditor will be entitled to recover the debt from all the brothers, jointly and severally, without having to establish that the debt was incurred for family purposes, and in case the debt be recovered from the 1st defendant alone, he will be entitled to contribution from his brothers. In the present case the plaintiff advanced but a trivial sum at the time when Exhibit J was executed as a part of the consideration for the mortgage bond. After it was signed by the 1st defendant, both he and the plaintiff endeavoured their best, but in vain, to prevail upon the 3rd defendant and Pothu Chetty to execute the document. Under all these circumstances, it will be unreasonable to conclude that the 1st defendant when he executed Exhibit J, intended to bind himself or his brothers if they did not execute the document. In my opinion Exhibit J simply amounting to a proposed agreement which was never perfected, the plaintiff himself contracted on the faith that the brothers would join and the 1st defendant executed the documents upon the understanding that his brothers also would join in executing the same.

The principle of law applicable to the case is clearly laid down in *Latch v. Wedlake and Louis Thomas* (11 A. and E. 959). In

that case it was held by *Lord Denman*, C. J., that notwithstanding that the contracting party were three *partners*, any one of whom alone could by his contract bind the rest, yet the question must have been submitted to the jury whether the two defendants by their executing the instrument intended that the 3rd partner should be bound, though he did not join in the execution, or at all events they intended to make themselves liable on the instrument, and whether the intention of all the parties was not that the 3rd partner should also be an actual party to the agreement. If one intends to be a joint and several obligee or only a joint obligee with the others, there is a right of contribution against his co-obligees; if his intention be carried out, but if he become a mere several obligee, he has no right of contribution (*Underhill v. Horwood*, 10 Ve. Junior, page 209 at 226). It is contended on behalf of the respondent, that there is a recital in Exhibit J that the debts mentioned therein were incurred for meeting the expenses of suits and for family expenses; and that the document should therefore be treated as executed by the 1st defendant as managing member of the family. If the parties intended that all the members of the family should execute the document, it cannot take effect by reason that the person who alone executed the document happens to be the managing member, and that the debt is recited to have been incurred for the benefit of the family.

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Moreover, in the present case, the recital in Exhibit J that the debt was contracted for the benefit of the family, may be referred to the circumstance that one of the parties to the instrument, *viz.*, the 2nd defendant, was minor.

In *Charlton v. the Earl of Durham* (4 Ch. Ap. Cases, p. 433) which was cited on behalf of the respondent, all that was held was that if a discharge purports to be signed by the two executors, and the debtor intended to have the receipts of both, the discharge will be valid, notwithstanding that the signature of one of the executors was no genuine, and that the receipt of one executor would operate as a valid discharge. The principle of that case is clearly inapplicable to a case like the one under consideration.

It has not been contended on behalf of the respondent that though effect may not be given to Exhibit J, as a mortgage bond ex-

R. Shadagopachariar and *T. Narasimha Aiyangar* for ap- Venkata Rao
pellant. v.
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Udayan.

S. Subrahmania Aiyar for respondents.

The Court delivered the following

JUDGMENT :—In our judgment the proviso which appears as the last proviso but one to section 11 of the Rent Recovery Act, has no application to the present case. The question in the present case, as the case of *Thangammal v. Mutta* in I. L. R., 10 M. 282, is whether the landlord has a right to charge water rate when a wet crop is cultivated on dry land by means of water taken from the landlord's land. We think the payment referred to in the patta in respect of the cultivation of wet crop with the landlord's water is rent and was properly included in the patta, and we agree with the observation of the judges in *Sattappa Pillai v. Raman Chetti*, I. L. R., 17 M. 1, that it is not improper to include in a patta the terms by which it is intended the parties shall be bound with reference to a possible contingency which may arise. We think the Deputy Collector was wrong in dismissing the suit. The proper course for him to have adopted would have been to decide in the mode prescribed in section 11 of the Rent Recovery Act what the terms of the patta ought to be with regard to the amount of the rate to be paid in the event of the tenant cultivating a wet crop in a portion of the punja mentioned in the patta with the landlord's water. In other words it is for the Collector to fix the rate chargeable for the use of the water.

The decrees of the lower Courts must be set aside and the case remanded to the Deputy Collector's to be dealt with according to law.

Costs of this second appeal will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Venkatappiah and another. .. Appellants*
(Judgment-debtors).

Jagannadha Rao Respondent
(Decree-holder.)

Venkatappiah *Execution—Application for execution—Fresh application—Continuation—Petition struck off—Res judicata—Order based on two adjudications—Judicial Act—Presumption—Question of irregularity raised on appeal—Transferee decree-holder—Application—Forum—Representatives of judgment debtor—Powers of executing Court.*
v.
Jagannadha Rao.

An application for execution of a decree by a sale of properties already attached in pursuance of a prior application not legally disposed of may be treated as one to continue such prior execution proceedings. But in so far as the later application asks for execution by attachment and sale of properties not comprised in the earlier one, such application must be treated as a fresh one and cannot be a continuation of the earlier execution proceedings.

The dismissal of a suit or an execution application based upon an adjudication as to a right claimed is *res judicata* as to such right and the fact that the dismissal is based upon another ground also does not make it any the less *res judicata*.

An application in execution will be pending until it is validly disposed of; and striking an application off the file is no valid disposal of it.

Where for the first time on appeal an objection was taken that the transferee decree-holder had not been brought on record by order of the Court which passed the decree and there was no evidence to show that such was the case:—

Held, that *omnia præsumentur rite esse acta* and that the objection could not be taken in appeal as no opportunity had been given to the other party in the lower Court to show that the formalities had been complied with.

As to whether the application to bring the transferee decree-holder on record should be made to the Court which passed the decree:—*Quære*.

Held, that the representatives of a judgment debtor who as such representatives had been parties to various proceedings in execution, were estopped from objecting to the validity of execution on the ground that they had not been formally brought on record as such representatives.

Where in addition to a copy of the decree a prior order granting execution by attachment of lands was also transmitted to another Court for execution, under clause (c) of section 224, C. P. C.:—

Held, that the executing court had power to do all acts necessary to give effect to the order granting execution, including the bringing in of the representatives of the judgment debtor if the judgment debtor should die before the sale.

But as to whether a court to which a decree alone has been sent for execution could proceed against the representatives of Judgment-debtor without an order therefor from the court which passed the decree *Quære*.

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Rao.

Appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 588 of 1899 presented against the order of the Court of the District Munsif of Gudivada, dated 24th day of July 1899, passed on E. P. No. 2828 of 1898 in O. S. No. 560 of 1873 on the file of the Court of the District Munsif of Ellore.

V. Krishnaswami Aiyar and K. Subrahmanya Sastry for appellants.

G. Sankaran Nair, P. R. Sundara Aiyar and P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENTS:—*Bhashyam Aiyangar, J.*:—The question raised in this second appeal is whether the execution of the decree for money, dated the 2nd December 1874, in Original Suit No. 560 of 1873 on the file of the District Munsif's Court of Ellore, is barred by limitation under section 230, Civil Procedure Code, or under Article 178 or 179 of the 2nd schedule to the Indian Limitation Act of 1877. The immediate application from which this appeal has arisen is execution petition No. 2828 of 1898, dated 11th October 1898, on the file of the District Munsif's Court of Gudivada, to which Court the decree was ultimately sent for execution by the District Munsif of Ellore, about the beginning of 1897.

The chief question for consideration is whether this petition is to be treated as a fresh application or as one in continuance of execution petition of the 2nd December 1886 presented to the District Munsif's Court of Bezvada, praying that the last-mentioned application (of 1886) may now be finally disposed of by sale of the landed property mentioned in the schedule thereto, which had been attached in 1887 in pursuance of that application.

In so far as there is a prayer for attachment and sale of the judgment-debtor's moveable and *other* immoveable properties, the petition can be treated only as a fresh application, but in so far as it prays for sale of property already attached, as aforesaid, it should be treated only as a continuation of the execution petition of the 2nd December 1886, if the latter has not yet been legally disposed of and is still pending. Both the Courts below held that

Venkatappiah the petition of 1886 is still pending, notwithstanding that the same
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Rao. 31st December 1887 and that the present application of October
Bhashyam 1898 is not barred by section 230, Code of Civil Procedure, inas-
Aiyangar, J. much as the judgment-debtors by their misconduct amounting to
fraud prevented the execution of the decree. The latter finding
cannot be upheld inasmuch as it is founded upon no legal evidence,
not to say that the averments made in the petition, even if true, do
not show that the execution of the decree was prevented by fraud
or force on the part of the judgment-debtors. No doubt they had
recourse to all possible legal means for obstructing the effectual
execution of the decree hitherto, and there may be reason to suspect
that they also instigated the suits which were brought by some of
their relations claiming as their own the lands which had been
attached in 1887 in execution of the decree. But there is no legal
evidence on record that the execution of the decree was at any time
prevented by the judgment-debtors' fraud. So much therefore of
the present application as prays for the attachment and sale of the
defendants' moveable property and *other* immoveable property
should be rejected as barred by the limitation of 12 years prescribed
by section 230, Civil Procedure Code, if not also by Article 179
of the Limitation Act, and the order appealed against should be
varied to this extent.

The execution petition presented on the 2nd December 1886
was presented just within 12 years from the date of the decree, and
it prayed for both attachment and sale of the landed property
specified in the schedule thereto and, as already stated, the attach-
ment was duly made in 1887 and in certain execution proceedings
between the present litigants, which were commenced in the Bezwada
District Munsif's Court in September 1890 and which eventually
came up to the High Court in second appeal, it was decided, on the
20th September 1893, that the execution petition of December 1886
was not barred by limitation in September 1890 and was then
legally pending, notwithstanding that it had been struck off the
file on the 31st December 1887. It also appears that long after
the expiration of the appeal time an appeal was preferred against
the order of the District Munsif of Bezwada, dated 31st December
1887, striking the petition off the file and the said order was
reversed on appeal, and the appellate decision was confirmed by the

High Court on the 21st September 1893. The attachment, which Venkatappiah had been made in 1887, had never been withdrawn under section 275, Civil Procedure Code, and the decree not having been satisfied and the decree-holder, the respondent, not having by laches or otherwise abandoned the attachment—which under law operates as a charge upon the property attached in favour of the attaching creditor in respect of the decree-debt—the attachment was legally subsisting in October 1898 when the decree-holder applied to the Court for sale of the property under attachment.

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It is urged on behalf of the appellant that the application of 1886 cannot be treated as still pending, that even if it be still pending it cannot serve the decree-holder any purpose and that no valid order for sale can be passed thereon and lastly, that the attachment ceased *ipso facto* when about the end of 1896 the Bezwada District Munsif certified to the District Munsif of Ellore the non-satisfaction of the decree in consequence of the former having ceased to have jurisdiction over the village in which the attached property is situate, which village was about April 1892 annexed to the jurisdiction of the newly established District Munsif's Court of Gudivada. The High Court decision of the 20th September 1898, above referred to, it is argued, cannot operate as *res judicata* between the parties, firstly, because it dismissed the application made by the appellants and, 2ndly, because one of the grounds for dismissing the application was that it was not competent to a judgment-debtor to ask in execution proceedings for a declaration that the execution was barred by limitation, though it was dismissed also on another ground, that the application of 1886 was still pending and that, therefore, the execution of the decree was not barred by limitation; and further, it is argued, that even if it does operate as *res judicata*, it operates only as an adjudication that in September 1890 the execution petition of 1886 was still pending and that the execution of the decree was not then barred by limitation.

The dismissal of a suit or of an application in execution proceedings will operate as *res judicata* when such dismissal is consequent upon an adjudication of the right litigated between the parties. The fact that the dismissal of the appellant's application was consequent not only upon the adjudication of the right litigated but also upon the ground that in exe-

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cution proceedings, he cannot seek for relief by way of declaration as in a regular suit, cannot entitle the parties to re-open in further execution proceedings the question of right thus adjudicated upon. The appellants' pleader has failed to show, when, subsequent to September 1890, the application of 1886 ceased to be pending and how it can be barred by the law of limitation now, if it was not barred in September 1890 and the same be still pending. Even assuming that the decision of the High Court in September 1893 cannot operate as *res judicata*, it seems clear that the application of 1886 has not yet been legally disposed of and is still pending. It has repeatedly been held that an order merely striking a petition off the file is legally inoperative as a disposal of the petition, and in this case even such an order was set aside on appeal as mentioned above.

The application of 1886 was complied with so far as the prayer for attachment of the land was concerned, but compliance with the prayer for sale was put off in consequence of suits brought by certain claimants for releasing the land from attachment. In an execution application under section 235, Civil Procedure Code, there need be no prayer for sale in addition to the prayer for attachment and under section 284, Civil Procedure Code, the Court may order that any property under attachment or such portion thereof as may be sufficient to satisfy the decree shall be sold.

The question as to whether in the absence of a prayer for sale in the application presented under section 235, Civil Procedure Code, a distinct subsequent application for sale is necessary under law *Ambica Pershad Singh v. Surdhar Lal* (I. L. R. 10, C. 851) and whether such application will be governed by Article 178 of the Limitation Act need not be considered in this case as the application of 1886 itself contains the prayer for sale, and the present application of 1898, so far as it applies for sale of the property already under attachment is only by way of reminder to the Court to dispose of the prayer for sale contained in the application of 1886.

An attachment which has been validly made by a Court and which, as already stated, creates a real charge in favour of the attaching creditor, cannot cease merely because the land attached is transferred from the jurisdiction of the Court which attached it to that of another Court or because the Court to which the decree was sent for execution certifies that it is unable to complete the

execution of the decree. By reason of section 244, Civil Procedure Code, such charge can be enforced only by execution proceedings and not by a separate suit, and it therefore necessarily follows that there must be a Court competent to enforce the charge in execution proceedings. The Bezwada Court, to which the decree was sent for execution by the Ellore Court, held that it could not enforce the charge by sale of the attached property, as subsequent to the attachment it ceased to have jurisdiction over such property and the District Munsif of Gudivada, to whom an application was made by the decree-holder to bring the property to sale, rightly or wrongly declined to comply with the application on the ground that the decree was not sent to his Court for execution. The decree-holder thereupon moved the District Munsif of Bezwada to certify non-satisfaction to the Ellore Court and then moved the Ellore Court to send the decree for execution to the Gudivada District Munsif's Court. The Ellore Court under section 224, Civil Procedure Code, sent to the Gudivada Court copy of the decree to be executed as well as the certificate mentioned in 224 (b) and copies of orders relating to the execution of the decree mentioned in 224 (c), Civil Procedure Code.

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Aiyangar, J.

There is no pretence whatever in this case that the decree-holder abandoned by laches or otherwise, his application of 1886 or the attachment made in pursuance thereof. The decree-holder made numerous applications to different Courts, and at every step the judgment-debtors by various technical objections hitherto successfully frustrated his attempts to realise the fruits of the decree and of the attachment thereunder.

The appellants' pleader argues that the application of 1886 cannot serve any useful purpose to the respondent because it was presented to the Bezwada Munsif's Court, not by the original decree-holder Papamma Row, but by one Venkatramayya Appa Row as the transferee-plaintiff and also because the present application was presented by Papamma Row herself, and further the appellants are not the judgment-debtors but the sons and representatives of the judgment-debtor against whom the decree was sought to be executed by the application of 1886. It is not contended that the application of 1886 was barred by limitation nor that the decree was not validly sent by the Ellore Munsif's

Venkatappiah Court to the Bezwada Munsif's Court for execution, after it had
 Jagannadha once been sent without any result to the District Munsif's Court
 Rao. of Masulipatam.

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 Aiyangar, J.

Under section 232, Civil Procedure Code, the assignee of a decree should apply for its execution to the Court which passed the decree and under section 234, paragraph (1) if a judgment-debtor dies before the decree has been fully executed, the decree-holder may apply to the Court which passed it to execute the same against the legal representatives of the deceased judgment-debtor. Under section 248, if the enforcement of the decree be applied for against the legal representative of the judgment-debtor, the Court executing the decree is enjoined to issue a notice to the legal representative to show cause why the decree should not be executed against him; and under section 234, paragraph (2) the extent of the liability of the legal representative is to be determined by the Court executing the decree. Under section 244, a question as to who is the representative of a party to the suit for the purposes of the execution of the decree is to be determined by the Court executing the decree.

It is contended, on behalf of the appellant, that the application of 1886 made by the transferee-plaintiff to the Munsif of Bezwada to whose Court the decree was sent for execution is bad in law inasmuch as under section 232 it ought to have been made to the Ellore Court. This point was not taken in either of the lower Courts nor in the memorandum of second appeal nor at any previous stage in the execution proceedings. Assuming that it is the Court which passed the decree and not the Court to which it is sent for execution that should permit the assignee of a decree-holder to execute the decree, there is nothing to show that such permission was not given by the District Munsif of Ellore either when the execution of the decree was pending in his Court or subsequent thereto, after having given to the parties concerned the notice prescribed by the section. The application of 1898 to the District Munsif of Gudivada was made by Papanamma Row herself, and no objection has ever been made that it was not competent for her to make the said application to that Court. If there was anything in such objections, the same ought to have been taken in the lower Courts so as to afford the respondents an opportunity to show that the requisite formalities have been complied with. In *Saroj*

Prasad v. Lakshmi pati Singh (14 M. I. A., 529), their Lordships of the Judicial Committee of the Privy Council, in overruling ^{v.} Jagannadha Rao. an objection which was taken in the original Court itself and persisted in throughout, that a copy of the decree was not transmitted to the Court to which it was sent for execution and that consequently the attachment and sale made by such Court in execution of the decree ought to be annulled, observed as follows (at page 541) :—

“ Assuming that, if no copy of the decree was sent, the attachment made at Dinajpore would be without valid authority, which their Lordships do not find it necessary to determine it lies on the defendant to prove that it was not transmitted. The Judge at Dinajpore acted on the certificate by attaching the lands and afterwards sold under that attachment. The maxim, therefore, *omnia præsumentur rite esse acta* must prevail until the contrary is shown. It certainly is not shown by the document of the 19th March 1884, for it is there stated that ‘certificates &c.,’ were sent; nor by the memorandum of attachment which refers to the *rookabara* ‘and other papers’ having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said that it must be inferred from the order which preceded the document of the 19th March that it was not intended to send the copy of the decree to Dinajpore. This perhaps may be inferred from that document taken alone, but it would not be safe to act on such an inference to annul the attachment and sale, especially, when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th March or at all events, before the attachment was made.”

As regards the other objection, that the application of 1886, even assuming it to be a valid one, could not be continued in the Gudivada Munsif's Court against the representatives of the judgment-debtor, the matter stands thus :—The judgment-debtor himself was alive in December 1886 when the application of 1886 was presented for the execution of the decree against him by attachment and sale of the lands in question, and he appears to have died some time in 1887 after the attachment was made. The appellants as the sons and legal representatives of the deceased judgment-debtor presented petition No. 1542 of 1890 to the District Munsif of Bezwada praying that the decree in question may be declared to have been barred by limitation and to be not executable and

Venkatappiah inoperative, Papamma Row being joined as respondent to the petition.

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Jagannadha Rao. — The contention raised in this petition was, as said above, carried up to the High Court and finally decided against them in September 1893. The appellants appear also to have been joined as the representatives of the deceased judgment-debtor in the suits brought by certain claimants apparently at the instigation of the appellants to release the property from attachment on the ground that it was not the property of the judgment-debtor, and numerous applications subsequently made by Papamma Row for the execution of the decree were successfully opposed on technical grounds by the appellants as legal representatives of the judgment-debtor. It is as such representatives that the appellants had any *locus standi* to oppose the various applications for execution of the decree against them, and the High Court's decision of the 20th September 1893, that the decree was not barred by limitation, and that the application of 1886 was still pending, necessarily implies that the decree was at that time enforceable against the appellants. The appellants themselves having intervened of their own accord both in the District Munsif's Court of Bezvada and that of Gudivada when execution of the decree was pending in those Courts, respectively, as representatives of the deceased judgment-debtor, they are estopped from contending that an order ought to have been obtained by the respondent from the District Munsif's Court of Ellore allowing execution against them as the representatives of the deceased judgment-debtor. In *Sham Lal Pal v. Modhu Indan Sircar* (I. L. R., 22 C. 558), it was held that the power of the Court executing a decree to order execution under section 249 against the legal representatives of a judgment-debtor is not cut down by the provisions of section 234, C. P. C., and that the Court to which the decree has been transferred for execution has full jurisdiction to proceed against the legal representative. It was also held in that case that the omission to apply under section 234, C. P. C., to the Court which passed the decree, assuming that such application was a necessary preliminary to proceedings being taken against the legal representative in the Court to which the decree has been sent for execution, is only an irregularity within the meaning of section 578, C. P. C., which did not affect the merits of the case. It is unnecessary to consider how far this decision is in conformity with the provisions of the Code and whether the distinction pointed out

in *Amar Chundra Banerjee v. Guru Presumad Mukarjee* (I. L. R., Venkatappiah 27 C. 488) between the case of an application by the transferee-plaintiff and that of an application against the representatives of a deceased judgment-debtor is well founded or not. Whatever may be the right construction of section 234, C. P. O., when it is applied to the execution of a decree sent by the Court which passed it to another Court for execution, it is by no means clear that it will be applicable to the enforcing of an order for execution, copy of which has been transmitted under section 224 (c) to the Court to which a decree is sent for execution. Under section 224 (c) the Court sending a decree for execution has to send not only a copy of the decree, but also copies of orders passed for the execution of the decree, whether such orders were passed by itself or by another Court to which the decree had formerly been sent for execution and under sections 225 and 226, C. P. O., copies of such orders are filed in the Court to which the decree is sent for execution, and the orders are to be executed by such Court. In the present case the order passed on the application of 1886, granting execution of the decree by attachment of the lands in question, was duly sent by the Ellore Court to the Gudivada Court, and the duty is cast on the latter to give effect to the order granting execution by attachment. Attachment is only a preliminary step for sale of the property attached or for the appointment of a receiver. The order granting the application for execution of the decree by attachment is really carried out only by selling the property and applying the sale proceeds towards the payment of the amount decreed and if, as held in *Groves v. Administrator-General of Madras* (I. L. R., 22 M. 119), there could be no valid sale if the judgment-debtor died after attachment and before sale, unless his legal representatives are brought on the record so as to give them an opportunity of preventing the sale by payment of the amount decreed, the Court to which the decree is sent for execution along with the order for execution can enforce the order against the legal representatives of the judgment-debtor. In the above view no question of limitation arises under Article 178 or 179 of the Limitation Act of 1877.

The second appeal therefore substantially fails and is dismissed with costs subject to the variation already pointed out in the order appealed against.

Moore, J. :—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Thirtha Swami ... Appellant.*

v.

Thirtha Swami and others ... Respondents.

Letters Patent—Security, refusal to receive—Judgment—Appeal—No time fixed for furnishing Security.

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v.

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An order refusing to receive security for costs directed to be furnished is, within the meaning of S. 15 of the Letters Patent, a judgment and an appeal lies against such order.

Where an order directing the appellant to furnish security for the costs of respondent did not specify a day within which to furnish the security and the court afterwards refused to receive the security furnished, it was held that the order was wrong and the appellants were directed to furnish security within a specified day.

Appeal under section 15 of the Letters Patent from the order of Mr. Justice Benson, dated 9th August 1901 dismissing C. M. P. No. 627 of 1901 praying for the receipt from the appellant in Appeal No. 227 of 1900 (O. S. No. 39 of 1899, Sub-Court of South Canara) of Rs. 1,664 as security for the costs of the respondents in the lower Court and in appeal.

J. P. Wallis (Advocate-General), *C. Sankaran Nair* and *K. Narayana Rao* for appellant.

O. Ramachandra Rao Saheb for respondents.

The Court delivered the following

JUDGMENT :—A preliminary objection has been raised as to whether an appeal lies under the Letters Patent against the order of Benson, J. As the effect of that order refusing to receive the sum ordered to be paid as security, would be to finally deprive the appellant of the power of prosecuting his appeal, we consider that the order of Mr. Justice Benson amounts to a judgment within the meaning of S. 15 of the Letters Patent and that there is consequently an appeal against it. As the order of Mr. Justice Boddam ordering security to be furnished was indefinite in that it

* L. P. A. No. 11 of 1901.

16th December 1901.

did not fix an exact date on or before which security was to be given, we consider that the sum tendered to this Court as security should have been received. We accordingly direct that the same be received provided it be tendered in cash to the Registrar of this Court on or before the 20th instant and the time for furnishing security is extended to that day. The Advocate-General on behalf of the appellant states that he does not wish to prosecute appeal No. 227 of 1900 against the legal representative of the 1st respondent.

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The parties will bear their own costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Arogya Udayan Appellant*
(Plaintiff).

v.

Appachi Rowthen and others ... Respondents
(1st and 3rd to 7th
Defendants).

Court fees—Suit for accounts—Jurisdiction—Valuation—Amendment of plaint—Alteration of jurisdiction. Arogya Udayan

In a suit for accounts the amount at which the plaintiff *bona fide* values his claim determines the court fees and the jurisdiction of the court. Appachi Rowthen.

When once the plaintiff has put a *bona fide* valuation on his claim, he cannot afterwards be permitted to amend the plaint by altering the valuation, especially if such alteration will oust the jurisdiction of the court.

Where the District Munsif permitted an alteration of the valuation and afterwards returned the plaint for presentation to a higher court :—

Held, that the order permitting the amendment was wrong and must be set aside and that the District Munsif had jurisdiction to try and decide the suit.

Such *bona fide* valuation does not affect the plaintiff's right to recover a larger sum, if, on taking accounts, a larger sum is found due. Only the plaintiff will have to pay court fees on the excess before executing the decree for the larger sum.

Appeal from the order of the Subordinate Judge's Court of Madura (West), dated 5th October 1900, in O. S. No. 22 of 1899.

And C. R. P. No. 45 of 1901, praying the High Court to revise the order of the Court of the District Munsif of Dindigul, dated 29th March 1899, passed on C. M. P. No. 293 of 1899 in O. S. No. 1061 of 1896.

* A. A. O. No. 26 of 1901 and C. R. P. No. 45 of 1901. 3rd December 1901.

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The plaintiff brought a suit for accounts in the District Munsif's court of Dindigul. The plaint valued the claim at less than Rs. 2,500 and was therefore properly filed in the District Munsif's court. The trial proceeded, and at a late stage it was discovered that the plaintiff would be entitled to more than Rs. 2,500. The plaintiff applied to the court for permission to amend the plaint by altering the valuation. The court permitted such alteration and afterwards returned the plaint for presentation to the proper court, on the ground that the new valuation was more than Rs. 2,500 and ousted the jurisdiction of the court. The plaintiff presented the plaint in the Subordinate court of Madura (West). The Sub-Judge held that in a suit for accounts, the plaintiff's valuation must determine the forum and that the District Munsif would still have jurisdiction to try the suit notwithstanding that the amount ultimately found due might be beyond the pecuniary jurisdiction of the District Munsif. He therefore returned the plaint for re-presentation to the District Munsif. The plaintiff now preferred an appeal against the order of the Sub-judge and a revision petition against the order of the District Munsif.

P. S. Sivaswamy Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is a suit for an account and in such a suit the valuation for purposes of court fees and jurisdiction does not disentitle the plaintiff to recover in the suit such higher amount as the evidence may show he is entitled to. The only restriction is that he cannot execute the decree without paying such additional court fee as may be due on the amount decreed. The valuation of the suit in the present case was made by the plaintiff in the *bona fide* belief that his valuation was correct and in law, that valuation determined the grade of court which had jurisdiction to entertain and try the suit. The valuation made indicated the District Munsif court as the proper court and the District Munsif was therefore legally seized of the case. A revision of that valuation by the plaintiff cannot be permitted so as to oust the jurisdiction of such court. In the present case the revision of the valuation had that effect, and the District Munsif returned the plaint and it was presented to the Subordinate Judge's court. Such a revision was unnecessary in the interest of the plaintiff as already stated by us,

and the District Munsif acted with material irregularity in permitting it. In our opinion, the Subordinate Judge took a correct view of the law in refusing to receive the amended plaint on the ground that the jurisdiction continued in the District Munsif and that he ought to try the suit. We may add that to hold otherwise would lead to objectionable consequences in that it would enable a plaintiff by merely altering the valuation to get his suit transferred even at a late stage (as in this very case) from the court in which it was rightly instituted to another court in which he might then think he had a better chance of success. We allow the revision petition and dismiss the appeal. We set aside the order of the District Munsif permitting the amendment of the plaint, direct him to receive the plaint, strike out the amendment and resume the trial of the suit under the original number. Plaintiff must pay the costs of respondents in this appeal and revision petition in this court.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bonson and Mr. Justice Blashyam Aiyangar.

Sundaram Aiyar	...	...	...	Appellant*
				(Plaintiff).
The Madura Municipal Council	..	...	...	Respondent
				(Defendant).

District Municipalities Act—Municipalities—Vesting of Streets—What vests—Freehold Sundaram Aiyar
—Ownership—Limitation—Limitation Act, 142, 144, 146A—Once a highway, v.
always a highway—Encroachment on highway—Obstruction—Trespass on free- The Madura Municipal Council.
hold.

The statutory vesting of streets in the Municipalities is not of the land or the subsoil of the streets, but only of the streets as streets and the municipalities have only so much right to the land and the soil below as is necessary for the repair and maintenance of the streets as streets subject to the burden of the highway. The freehold of the land and the subsoil continues in the original dedicators whoever they may be, the Government or private persons, or vests in the owners of the houses on either side *ad medium filum*.

Adverse possession of a land dedicated as highway will give the ownership of the land in 12 or 60 years according as the owner is a private person or the Government, and the burden of highway will be extinguished in 30 years according to Art. 146A.

Semle that the doctrine "once a highway, always a highway" was not applicable to India even before the enactment of Art. 146A and adverse possession of a highway for 12 years before the passing of 146A would have extinguished the highway.

*S. A. No. 798 of 1900.

18th December 1901.

Sundaram Aiyar v. The Madura Municipal Council. An encroachment on or obstruction in a highway is a public nuisance as well as a trespass upon the freehold for which an action may be maintained by the owner.

Second Appeal from the decree of the Subordinate Judge's Court of Madura (West) in Appeal Suit No. 450 of 1899, presented against the decrees of the Court of the District Munsif of Madura in Original Suit 693 of 1898.

P. S. Sivaswami Aiyar and *T. R. Venkatarama Sastri* for appellant.

C. Sankaran Nair for respondent.

The Court delivered the following

JUDGMENTS :—*Bhashyam Aiyangar, J.* :—In the plaint, the plaintiff claims as owner three items of property, each of which he describes as a plot of certain dimensions with the granite pial built thereon, immediately to the east of his dwelling house and to the west of the street and prays that a permanent injunction may be issued restraining the defendant (the Municipal Council of Madura) “from interfering with or from causing obstruction to the plaint sites, from removing the granite pials built on the plaint sites or from taking any steps to remove the same.”

The defendant in his written statement states that the slab-stones which the plaintiff was required to remove, have been only recently put up, that as the defendant has all along been using the drain below the slab-stone, the plaintiff cannot acquire any prescriptive right against the defendant, that the construction in question being admittedly a projection over the drain in front of plaintiff's house, the defendant has every right to remove the same under section 168 of Act IV of 1884 (as amended by Act III of 1897), and that as the defendant is only carrying out the orders of the Local Government in removing the slab-stones, with a view to introducing a drainage scheme for the whole town, the plaintiff is not entitled to the injunction prayed for.

Issues were framed as to whether the plaintiff has acquired any and what right in the said pial and whether it was competent for the defendant to remove the pial and whether the plaintiff was entitled to the injunction sought for. The District Munsif finds that the pial has been in existence for the last 30 years at least,

that it does not in any way interfere with the cleaning of the drain under it and that the pial also projects a little into the street beyond the drain and that the plaintiff having acquired a right by adverse possession is entitled to the injunction sought for. The District Munsif in meeting certain arguments advanced on behalf of the defendant, observes that the ground over which the pial is built forms a portion of the street and that the public could not use such portion for any purpose, that though there is a drain under the pial in a portion of it, the 'major portion of it is ground' and that the plaintiff does not claim any right over the drain and 'the question is with regard to the land.'

Sundaram,
Aiyar
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The Madura
Municipal
Council
Bhashyam
Aiyangar, J.

The Municipality preferred an appeal to the Subordinate Judge of Madura (West) and the third ground in the memorandum of appeal runs as follows:—"The lower court is wrong in describing the slab-stones put up as pial and in holding that the major portion of it is ground." The Subordinate Judge differing from the District Munsif's view that the plaintiff has acquired title by adverse possession, reversed his decree and dismissed the plaintiff's suit. The chief ground on which his judgment is based seems to be that plaintiff's possession of the pavement has simply been permissive as is shown by the fact of his having asked leave of the Municipality in 1892 for substituting slab-stones in place of brick work on the pial and the Municipality, as then advised, having accorded such permission, as also by the fact of the Municipality having all along had the control of the drain underneath the pial. The Subordinate Judge in his judgment makes the following observations as to the plaintiff's case:—"In the site occupied by the pial and the drain plaintiff claims no title, but he claims to be owner of it by adverse possession as against the Municipality * * * . Plaintiff, it will be seen, does not claim the site in question as his private property; it is part of the street; according to the definition of the word 'street' in the new Act the drains form part of the street."

This second appeal is preferred by the plaintiff against the decree of the Subordinate Judge and the chief contention relied upon in support of the appeal is that upon the facts found by him, the Subordinate Judge ought to have held that the plaintiff acquired a title by prescription, that after he has acquired such title, the construction cannot be regarded as an encroachment or con-

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tinuing wrong, and that the Subordinate Judge has misconstrued the application made by the plaintiff to the Municipality in 1892 (for permission to substitute stone-slabs in place of brick work on the pial) in holding that his occupation of the pial was only permissive and not as of right. The appellant's pleader explains that the so-called pial in question is a projection from the main wall of the house over the Municipal drain and partly over the road or highway adjoining the drain, and that the projection rests upon masonry pillars standing on the road. There is no evidence or plan on record showing exactly the nature and dimensions of the pial in question, as also of the drain, and the extent of the road covered by the pial and the number and dimensions of the pillars on the road, supporting the pial, nor is there any evidence to show whether the pial is an open one or covered by roof, thatched or of masonry work.

Though the District Munsif rests the plaintiff's claim solely on title by prescription and the Subordinate Judge states in his judgment that the plaintiff 'does not claim the site in question as his private property,' a reference to the plaint shows that the plaintiff does claim the pial in question with the site thereunder, as belonging to him with his house, subject only to the defendant's right to the drain underneath the pial. The courts below and the parties to the suit have proceeded on the assumption and footing that the statutory vesting of streets and drains in a Municipality has the effect of vesting in the Municipality the ownership of the land over which the streets, and drains are formed and it is apparently on that footing that the learned pleader for the appellant contends before us that his client has acquired title by prescription. This, no doubt, will be so, if the land itself had been acquired by the Municipality, either by purchase or otherwise and roads and drains formed thereon (section 158 of Act IV of 1884). But if the street or highway over the land was dedicated to the public either by the State or by the owners of the land adjoining the highway or by any other person, the ownership in the soil of the street or highway will continue vested, subject only to the burden of the highway, in the State or the respective owners of the land on either side of the highway, *ad medium filum*, or in any other person who may have dedicated the street to the public as the case may be.

The first question, therefore, which has to be determined, is the nature of the right, title and interest vested in the Municipality, by the District Municipalities Act, in respect of public streets and drains and this question has to be determined chiefly with reference to English decisions. In *Orr Ewing v. Colquhoun* (L. R. 2 A. C.). Lord *Hatherley* speaking of the *Leven*, a navigable but non-tidal river, says (at p. 846) "There are two totally distinct and different things: the one is the right of property, and the other is the right of navigation; the right of navigation is simply a right of way," and Lord *Blackburn* (at p. 854) states that "the public, who have acquired by user, a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do." In the case of *Galbraith v. Armour* (4 Bell's Appeals, 374) in the House of Lords, Lord *Campbell* said, "I must express my clear opinion that by the law of Scotland as well as by the Law of England the soil of public highways is presumed to be in the continuous proprietors; and that, if a public highway is established by usage, over the land of another, the soil is still his, with all his former rights subject to the public servitude which he has suffered to be established." It will thus be seen that the right of the public to the use of land, as a highway, is not regarded as in the nature of property or proprietary right and in the General Highway Act, 1835 (5 and 6 Will. IV. C. 50) the management of highways was practically placed in the hands of the parish surveyor or the district surveyor as the case might be. That functionary had no right in roads beyond mere rights of control and management and both the property in the road and the possessory rights in respect thereof, subject of course to the right of passage on behalf of all the King's subjects, were vested entirely in the persons or the successors of the persons who had originally granted the right of passage to the public. But in passing the Metropolis Local Management Act, 1855, the Legislature considered that, in order to enable local bodies and authorities to execute their functions properly in regard to the management of highways, it was necessary to give to them some further powers and greater rights than those which had been originally possessed, under the General Highway Act, by the surveyor of highways, and the object was carried out by giving to them over and above the easement of passage which the public

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had and which they might be able to enforce as representing the public and over and above the rights of control and management to which they would succeed as invested with the functions of the old surveyor of highways, some right of property in the soil or a portion of the soil of the street (per *Theiger*, L. J., in *Rolls v. Vestry of Saint George*, L. R. 14 Ch. D 801). The same course was also adopted by the Indian Legislature. Under Act XXVI of 1850, which was the first enactment of the kind applicable to this Presidency, power was given to extend the provisions of the Act to any town in the Presidency in view to "making better provision for making, repairing, cleaning, lighting or watching any public streets, roads, drains or tanks or for the prevention of nuisances." The Act did not vest in the Commissioners to be appointed thereunder, any property in the public streets, roads, &c. Whether or not the provisions of this Act were applied to Madura does not appear. But when Act X of 1865 was passed, streets and roads were, as in the case of the English Metropolis Local Management Act of 1855, vested in the Municipal Commissioners as 'public highways' (not being the property of and repaired by and kept under the control of the Government and not being private property) together with the pavements, stones and other materials thereof and also all erections, materials, implements and other things provided for such highways (Madras Act X of 1865, section 11). Act X of 1865 was superseded by Act III of 1871 and all public streets in any town to which this Act was applied, were vested with their appurtenances in the Municipal Commissioners (section 13). This again was superseded by Act IV of 1884 and all public streets with their appurtenances were vested in the Municipal Council by section 23 and also sewers and drains, &c., by section 24.

Under Act III of 1897 amending Act IV of 1884, the definition of 'street' (section 3, cl. 27) was amended by including in the term 'street,' the drains on either side. The parenthetical phrase 'not being private property' next after the words 'with the land' were omitted and the reference to the 'main wall of any house adjacent to the street' was superseded by reference to 'the boundaries of the adjacent property.' The object of including drains in the definition of 'street,' is by no means obvious, seeing that section 24, vesting sewers, drains, &c., in the Municipal Council is retained.

The omission of the parenthical clause 'not being private property' does not, in my opinion, really enlarge the definition of 'street' inasmuch as the expression 'adjacent property' in the new phrase 'up to the boundaries of the adjacent property' will comprise 'private property' though it may project beyond the actual building. Why the reference to such a distinct mark as the main wall of a house has been omitted, even when as is usually the case, the houses adjoin the street, is not apparent. There is, therefore, really no force in the argument advanced on behalf of the respondent that the amendment made by Act III of 1897 has the effect of enlarging the definition of 'street' so as to include therein even private property lying between the roadway and the main wall of the house. It becomes, therefore, unnecessary to consider whether such property, even if it has now become, by virtue of the Amendment Act III of 1897, part of the 'street,' could vest in the Municipality, in whom is vested only 'a public street' which is defined as denoting only 'any street' which is now vested in the Municipal Council or which may hereafter be made at the cost of the Municipal fund or which may hereafter be declared under section 163 to be a public street (Act III of 1897, section 3, clause 28).

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I shall now refer to some of the principal English cases in which the question of the extent of property and the nature of the right, title and interest possessed by urban authorities in streets vested in them under the Metropolis Local Management Act, 1855, the Public Health Act, 1875, and similar enactments, were considered and settled. The leading case in which the question first presented itself for consideration in the Court of Appeal is *Coverdale v. Charlton* (L. R. 4 Q. B. D. 104). In that case it was held that by force of section 149 of the Public Health Act, 1875, which vested all streets in the local board and under its control, the property in the soil of the street so far vested in the local board that they could demise the right of pasturage thereon to the plaintiff. *Bramwell, L. J.*, at pp. 116—118, says, "I am disposed to hold that this 'street' vests without any property in the freehold of the soil. The word 'vest' may have two meanings. It may mean that a man acquires the property '*usque ad cælum*' and to the centre of the earth, but I do not think that to be its meaning here. One construction of the word 'vest' here is that it gives the property in the soil, the

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freehold, the surface and all above and below it; but that would be such a monstrous thing to say to be necessary for the proper control of the streets by the local board, that I cannot suppose it to mean such a thing. Suppose the soil of the freehold passes, and consequently it carries the right to the land to an indefinite extent upwards, and to the centre of the earth below the surface, I cannot make up my mind to say that is the meaning of the word 'vest' in section 149. * * What then is the meaning of the word 'vest' in this section? The Legislature might have used the expression 'transferred' or 'conveyed,' but they have used the word 'vest.' The meaning I should like to put upon it is that the street vests in the local board *quā* street; not that any soil or any right to the soil or surface vests, but that it vests *quā* street. * * The meaning I put upon the word 'vest' is, the space and the street itself, so far as it is ordinarily used in the way that streets are used—shall vest in the local board. * * * That would show that 'street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but surface of such a thickness as the local board may require for the purposes of doing to the street that which is necessary to it as a street, and also of doing those things which commonly are done, in or under the streets; and to that extent they had a property in it."

Brett, L. J., says (at p. 121) :—" 'Street' means more than the surface, it means the whole surface and so much of the depth, as is or can be used not unfairly for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street, and to lay down sewers, for at the present day there can be no street in a town without sewers and also for the purpose of laying down gas and water-pipes. * * * * If the Enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of the owners to the soil in a 'street' is of so little value, intentionally taken away that right and have given it to the extent I have mentioned to the local board" (At p. 126) *Cotton, L. J.*, in concurrence with his colleagues, says: "Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words 'vest in' must be 'passed to and vested in' the local board; it is sufficient

in the present case to say that the street and the surface vested in the local board some property in the soil for the purpose for which it was to be used, and in my opinion I must hold that the 'street' is a material thing and that under this clause, it vests in the local board."

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James, L. J., explained the principle of the above decision as follows in *Rolls v. Vestry of St. George* (L. R. 14 Ch. D. at pp. 795, 796). "What that case decided, and all that was necessary to decide in that case, was that something more than an easement passed to the local board, and that they had some right of property in and on and in respect of the soil which would enable them as owners to bring a possessory action against trespassers. Now, what was that something more? It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view of the learned judges, the soil and freehold in the ordinary sense of the words "soil and freehold," that is to say, the soil from the centre of the earth up to an unlimited extent into space, did not pass, and that no *stratum* or portion of the soil, defined or ascertainable like a vein of coal or *stratum* of ironstone, or anything of that kind passed, but that the board had only the surface, and with the surface, such right below the surface as was essential to the maintenance, and occupation, and exclusive possession of the street and the making and maintaining the street for the use of the public."

In the *Mayor of Tunbridge Wells v. Baird* (L. R. 1896 A. C. 434,) the House of Lords affirming the decision of the Court of Appeal in 1894, 2, Q. B. 867), held, with reference to section 149 of the Public Health Act, 1875, vesting certain streets in the urban authorities, that it had not the effect of vesting the subsoil in the urban authority, and that, therefore, where a local Act authorised the urban authority to erect and maintain 'in any street or public place' lavatories for the use of the public, the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them. Lord *Halsbury* (at p. 437) says, "that the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as *James, L. J.*, points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought

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convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and therefore there was given to them an actual property in the street and the materials thereof. * * *

It is intelligible enough that Parliament should have vested the street *quâ* street and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Referring to the case of *Coverdale v. Charlton*, he observes (at p. 439): "Lord *Bramwell* is reported to have said that it would be a reasonable construction of the Statute to suppose, not that the soil of the freehold had been given in the sense which I have described, but only so much that the street should be used as a street; and then his Lordship is also credited with the observation that the local authority would have authority to do such things as are commonly done in or under a street. My Lords, I think, if his Lordship did use those words, he could not have had in his mind such a question as is now before your Lordships, because, if so, it would really be inconsistent with the rest of his judgment. 'What is commonly done in a street' may include water-pipes and gas-pipes as well as sewers, and it could not be supposed that any such power was intended to be conveyed by such language. I think what his Lordship must have meant was such things as are usually done in a street, for the purpose, as he elsewhere in his judgment describes it, of maintaining it as a street, and which are incident to the repair and maintenance of the street as a street. For that purpose it would be intelligible. For any other purpose, it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued, of not taking private rights without compensation. In circumstances in which it is essential to take private property, Parliament has always provided for compensation, and in this section the language itself imports that where private property is being dealt with, it can only be done 'with the consent of the owner.'"

Lord *Herschell* (at pages 440, 441) says, "The learned counsel for the appellants have contended that it has been established by

decision that if a street has so vested, the soil below the street at all events to the depth necessary for the construction of sewers, has vested in the urban authority and that they have not gone below that depth. The case relied on and the only case, I think, which can be called a decision, although I do not think that word is accurate even as regards that case, is *Coverdale v. Charlton*. All that had to be determined in that case was whether the vesting of a street gave the urban authority power to let pasturage on the surface: it was not necessary to decide anything more than that. If sufficient property vested for the purpose, then there was a good demise on the part of the urban authority. But no doubt the opinion was expressed there that the vesting of the street would carry something more than the mere surface, and that in addition to what was necessary for its maintenance as a highway, there would be transferred to the urban authority soil below that sufficient for all the ordinary uses of land below a highway. My Lords, I confess I see considerable difficulty in accepting any such view. In the first place, the language of the enactment seems to me to point in a contrary direction. Section 149 vests 'all streets' being or becoming highways repairable by the inhabitants at large 'and the pavement and stones and other materials thereof.' All that seems to point to the surface use of the street and nothing more, and I am unable to see why it should be supposed to transfer to and vest in the urban authority the sub-soil below for sewage purposes, because that is provided for, and amply provided for, by other provisions in the same statute. "By section 13 'all existing and future sewers' are 'vested in' and placed 'under the control' of the local authority in precisely the same language as the streets are in the section now under consideration. What necessity, therefore, is there for transferring, by a clause vesting the streets, the soil under the street in which the sewers are, when the sewers themselves are, with certain exceptions which it is unnecessary to go into, vested in the local authority?" * *, (p. 442) "My Lords, it seems to me that the vesting of the streets vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use." Lord *Macnaghten* (at p. 442) concurred in this opinion and desired only to add that "the meaning of section 149 of the Public Health Act, 1875, is to give to the urban sanitary

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authority the control and management of the streets coming within the description therein contained and such statutory right in the nature of a right of property as may be sufficient to authorise them to sue and be sued as occasion may require in the course of such control and management."

This decision was followed and applied by the Court of Appeal in a case arising under section 96 of the Metropolis Local Management Act, 1855, (*Battersea Vestry v. County of London, &c., Electric Lighting Company*, 1899, 1 Ch. 474). In that case, an electric lighting company, the defendant, had illegally broken up the surface of a street within the district of a vestry in the metropolis and placed their pipes and wires at a depth of about 2 feet below the surface. It was held that the vestry were not by virtue of section 96, the owners of the soil of the street at that depth and that although the defendant company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires, there being no continuing trespass upon, or interference with, any rights of the vestry. In the *Municipal Council of Sydney v. Young* (1898, A. C. 457), which came on appeal before the Privy Council from the Supreme Court of New South Wales, it was held that the Sydney Corporation Act of 1879, which vests public ways in the Municipal Council, does not so vest in them the proprietary right which alone gives claim for compensation, but only for purposes incidental to the exercise of municipal authority. Lord Morris in delivering the judgment of their Lordships of the Privy Council (at p. 459) says, "Now it has been settled by repeated authorities, which were referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the Municipality, beyond the surface of the street; and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but it does not vest the soil or the land in them as owners. If that be so, the only claim they could make would be for the surface of the street, as being merely property vested in them *quâ* street, and not as general property."

Though the principle of the decision in *Coverdale v. Charlton* in so far as it lays down that some kind of property in the street is vested in the urban authority, is not shaken by the decisions above

referred to, yet its authority as to the nature and extent of such property is considerably shaken. The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District Municipalities Act, is not the land over which the street is formed, but the street *quâ* street and that the property in the street thus vested in a Municipal Council is not general property or a species of property known to the Common Law, but a special property created by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway, and that when it ceases to be a highway, by being excluded by notification of Government under section 23 of Act IV of 1884 or by being legally stopped up or diverted, or by the operation of the law of limitation, (assuming that by such operation the highway can be extinguished) the interest of the corporate body determines; and that the clauses directing or authorising the corporate body to sell, have reference only to property absolutely vested in it, but as to property in which its interest ceases it has nothing to sell (*Rolls v. Vestry of St. George*, L. R. 14 Ch. D. 785 at p. 797).

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In connection with the vesting of street in urban authorities, I may here refer also to two other cases (*Wandsworth Board of Works v. United Telephone Co.*, L. R. 13 Q. B. D. 904 and *Lord Provost of Glasgow v. Glasgow and S. W. Ry. Coy.*, L. R. 1895, A. C. 376) which bear upon the extent to which the urban authority has a right in the air space over the surface of a street and below, and beside a bridge over which the street was carried. In regard to the drain which is also vested in the Municipality, the extent of air space above the drain to which the Municipal Council may be entitled will not be the same as in the case of the street (*Mayor of Birkenhead v. L. and N. W. Ry. Co.*, L. R. 15 Q. B. D. 572).

Turning now to Indian cases, in the *Chairman of the Naihati Municipality v. Kishori Lal Goswami* (I. L. R. 13 C. 171) it was held that the vesting of roads in a Municipal corporation by Bengal Act V of 1876, section 82, did not pass to the Municipality the soil beneath the roads. • In *Madhu Sudhun Kundu v. Pramoda Nath Roy* (I. L. R. 20 C. 732) the same view was taken with regard to the operation of section 10 of the Bengal Act, III of 1864, and it

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was held that it does not deprive any person of any right of private property that he may have in land used as a public road and that it does not vest the subsoil of the land in a Municipality. The decision of the Allahabad High Court in *Nihal Chand v. Azmat Ali Khan* (I. L. R. 7 A. 362) proceeds on the same view as to the effect of section 38 of the N. W. Provinces and Oudh Municipalities Act (XV of 1873). If the decision of this Court in *Municipal Commissioners for the City of Madras v. Sarangapani Moodaliar* (I. L. R. 19 M. 154) is to be understood as proceeding upon the supposition that the site and soil of streets in the city of Madras became vested in the Municipality by Act IX of 1865, and that the Municipal corporation thereby became the proprietor of the land in trust for the public, such supposition is wholly irreconcilable with the decisions above referred to, both English and Indian, and with all deference to the learned Judges who took part in the decision, I am unable to concur in such opinion.

I am aware that in the definition of 'street' the word 'land' is used in connection with appurtenances to the street lying on either side of the roadway. It is evident that the word 'land' is used as denoting only what in reality is a portion of the street as such, and that such portion of the street vests in the Municipality only in the same way as the roadway or *via trita*.

In the view I take of the nature of the right vested in the Municipality as regards public streets, there is no disposal by the Indian Legislature of any land or hereditament vested in Her Majesty by section 39 of the Government of India Act, 1858 (21 and 22 Vic. C. 106) assuming that the Crown is the owner of the land forming the street in question. It becomes, therefore, unnecessary to consider whether, having regard to the restriction imposed on the Indian Legislature by the proviso to section 22 of the Indian Councils Act, 1861 (24 and 25 Vic. C. 67) and to the authorities empowered in their executive capacity to dispose of all real and personal estate for the time vested in Her Majesty by section 40 of 21 and 22 Vic. C. 106 and section 1 of the Government of India Act, 1859 (22 and 23 Vic. C. 41) and to the restrictions imposed by the last-mentioned enactment on such power of disposal (which restrictions are to be prescribed from time to time, by the Secretary of State for India in Council, it would be competent

for the Indian Legislature to transfer, to a local authority, real or personal estate which, "for being applied and disposed of for the purposes of the Government of India, is vested in the Crown."

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The question of limitation has now to be considered, but as that cannot be decided until the question of ownership in the land burdened with the highway and the drains is determined, (in regard to which certain issues will have to be remitted to the lower appellate Court), I shall now deal with it only in view to drawing attention to the salient points on which the question of limitation turns. Under the English law, the maxim "once a highway, always a highway," is founded upon the notion that the public cannot release their rights and that there can be no extinctive presumption or prescription [per *Byles, J.*, in *Dawes v. Hawkins*, 8 C. B. N. S. 858 (S. C.), 29 L. J. C. P. at p. 347]. Of course a highway may both in England and here be extinguished or diverted under statutory provisions. The extinctive presumption and prescription referred to by *Byles, J.*, are not the result of any statute of limitations, but of immemorial prescription from which a grant is to be presumed; but only in cases in which such grant could have a lawful origin. In the case of a highway, there could be no lawful grant even by the Crown, much less by any other authority or person, to obstruct the same or appropriate it or continue a nuisance thereon [*Attorney-General v. Parmeter*, 10 Price 378; and *Parmeter v. Gibbs*, 10 Price 412 S. C., 24 R. R. 723]. The principles enunciated by *Byles, J.*, are as applicable in India as in England, but, even if in England the right of highway is not extinguished by the operation of the law of limitation, it by no means follows that such extinction does not take place under the law of limitation in India. It would appear that in England up to the passing of the Public Health Act, 1875, there was no statutory provision which vested property in highways repairable by the inhabitants at large in any public body [per Lord *Russell, C. J.*, in *Reynolds v. Urban District Council of Presteign*, L. R. 1896, 1 Q. B. 604 at p. 608. *Octave Chavigny, &c., v. Lacite De Montreal*, L. R. (1886) XII App. Cases, p. 149, at p. 159. See Bombay Act V of 1879 (Land Revenue Code), S. 37]. Until, the highways were thus vested in a corporation, it seems tolerably clear that no question of limitation could have arisen in respect of highways under the English law of limitation. But it is not equally clear that

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since the vesting of highways in urban authorities, the English law of limitation could have no operation upon the property thus vested in them, and I have not been able to find any case in the English reports in which the question was raised or considered. It is noteworthy that neither in *Wallasay Local Board v. Gracey* (L. R. 36 Ch. D. 593), nor in *Tottenham Urban District Council v. Williamson and Sons* [L. R. 1896 (2) Q. B. 353] in which the Court of Appeal approved of and followed, the former decision (in both of which it was held that under the provision of the Public Health Act, 1875, the local authority cannot, in the absence of special damage, sue in respect of a public nuisance, except by an action in the nature of an information with the sanction of the Attorney-General) was it sought to sustain the suit on the ground that under section 149 of the Act, streets were vested in the local authority and that it was therefore competent for the local authority to maintain the suit in its own name. The Indian law of limitation has from the commencement been more comprehensive than the English statutes, and the recent amendment of the Indian law of limitation by Act XI of 1900, (which provides a period of 30 years from the date of dispossession or discontinuance for a suit by or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession) seems to me to be now decisive on the question, whatever doubt may have possibly existed prior thereto; and I do not think that this new article (146 A) can be reasonably restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in proprietary right. The operation of section 28 of the Limitation Act (XV of 1877) upon this new article will be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by encroachment and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, viz., 12 years, and at the expiration of 30 years the ownership thus

acquired by the wrong-doer will be freed from the burden of the highway. But if the highway had been dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of 60 years' adverse possession or occupation by the trespasser. The curious result therefore of the new article of the Limitation Act will be that, in cases in which the site of the street belongs to the Crown, on the expiration of 30 years from the date of dispossession of the Municipality, the Crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment and after removing the same, it may again dedicate, as a highway, the portion of land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would become the absolute owner of the land. Section 28 of the Limitation Act which provides that in the case of a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the wrong continues, will cease to have operation from the moment when by virtue of section 28, the wrong ceases to be such by virtue of the title conferred by the statute on the wrong-doer. If prior to the enactment of the new Article (146-A), the ordinary period of 12 years under Article 142 or 144, as the case may be, were applicable as against the Municipality in respect of encroachments on public streets, the same result would have followed, except that the highway would have been extinguished at the expiration of 12 years instead of 30. I may also add that a person who causes an encroachment or obstruction of a permanent character on a highway or exceeds the right of ordinary and reasonable user of it for the purpose of passing and re-passing, will, besides committing a public nuisance (at any rate in the case of an obstruction or encroachment), be also guilty of a trespass on the land for which the owner can sue him. [*Harrison v. Rutland*, L. R., 1893 (1) Q. B. 142; and *Hickman v. Maisey*, 1900 (1) Q. B. 752].

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Bhashyam
Aiyangar J.,

In connection with the requisition of the Municipal Council that the plaintiff should remove the pial over the drain in front of his house, it should be borne in mind that the owner of land adjoining a public highway, is legally entitled to erect gates or open doors so as to give him access to the highway at any point he

Hundaram Aiyar v. The Madras Municipal Council. pleases, whether the soil of the highway be his or not (L. R. 7. Q. B. 166 and 67 L. T. 169. *London and North Western Railway Company v. Mayor, &c., of the City of Westminster*, Weekly Notes, November 30th 1901, p. 230, S. C. Law Times, Vol. CXII, p. 83).

Bhashyam Aiyangar, J. For the determination of the second appeal it is necessary to remit the following issues for trial by the lower appellate Court :—

- (a) When and by whom was the street in question dedicated as a highway to the public and when was it first vested in any "local authority" as that expression is defined in section 3, Cl. 28 of the General Clauses Act (X of 1897) and when and by whom was the drain in question formed and when was it vested 'in a local authority'?
- (b) Irrespective of the operation, if any, of the law of limitation, who is entitled to the ownership of the land covered by the street and drain in front of the plaintiff's house, over which the structure claimed by the plaintiff projects?
- (c) When was the plaintiff's house originally built and whether the structure in question was erected along with the building, and if not when and how long afterwards?
- (d) What are the nature and dimensions of the structure in question and the drain underneath it, the extent of the road covered by it and the number and dimensions of the pillars on the road supporting it?

As some of the issues now to be sent for trial involve the question of the right of the Government to the ownership of the soil in public streets, and as all material documents bearing on this question will be in the possession of Government, I think it desirable that the Secretary of State for India in Council should be joined as a party to the suit and appeal in this and the connected second appeals Nos. 792 and 1101 under Ss. 32 and 582, Civil Procedure Code. But at this stage of the case I am not disposed to do so without the consent of Government. The appellant and the respondent state that they have no objection to the Government being joined as a party.

Parties will be at liberty to adduce fresh evidence at the trial of these issues and to exhibit the requisite plans after duly proving the same. The Subordinate Judge will submit his findings on the above issues within three months after the receipt of this judgment.

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Benson, J.:—I entirely concur with my learned colleague as to what is meant by the Legislature vesting streets in a Municipal Council. The whole current of authority both in England and in India shows that such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad cœlum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street (4 Q. B. D. 104), and it has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers (L. R. 14 Ch. D. 725, per *James, L. J.*) “so that the complete vindication of the rights of the public should be preserved by the local authority” (1896 A. C. 434, per Lord *Halsbury*). “This property is, as my learned colleague put it, not general property or a species of property known to the Common Law, but a special property, the creature of the Statute, and vested in the local authority for a public purpose.

I am also prepared to concur as to the results that will flow from the application of the law of limitation if the plaintiff has established a prescriptive right to a portion of the public street, but having regard to the limited and special nature of the right over the soil vested in the Municipal Commissioners, it is difficult to see how the erection of the pial described in the plaint could amount to a dispossession of the Municipal Commissioners in respect to this right so as to enable the plaintiff to acquire the right of a full owner over the site occupied by the pial. The Subordinate Judge has found as a fact that the plaintiff’s possession was “always under leave of the Municipality, who had control of the drain underneath.” Apparently there was nothing else which the Municipality had any occasion to do in the exercise of its duty to maintain the street (including the drain) on behalf of the public. It lies on the plaintiff who seeks for an injunction to establish his title and the only title alleged is by prescription. It is difficult to see how the

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erection of this pial which apparently did not interfere with the maintenance of the street as a street could be held to be a dispossession of the Commissioners with regard to the street. The information on the record, however, as to the nature and extent of the pial is not very full or accurate. Before finally deciding the question I agree that it is desirable to have further evidence on these points. I therefore concur in the order proposed by my learned colleague. I reserve for consideration after we have a finding on the issues referred, the question whether the remedy by injunction is one that ought, in any event, to be granted in a case like the present where the removal of the pial is alleged to be necessary on sanitary grounds.

IN THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL.

(FROM THE ALLAHABAD HIGH COURT).

Present:—Lord Hobhouse, Lord Macnaghten, Lord Shand,
Lord Davey, Lord Robertson and Lord Lindly.

Bahadur Singh and others *Appellants.**

v

Mohar Singh and others *Respondents.*

Bahadur
Singh
v.
Mohar Singh.

Hindu Law—Widow—Reversioner—Spes successionis—Contract between widow and nearest reversioner for the time being—Actual reversioner—How far bound by contract.

The nearest reversioner of a Hindu widow has during her lifetime only an expectancy or a *spes successionis* and any contract which such expectant heir may enter into with the widow in reference to the expectancy is not binding upon the actual reversioner though the latter may trace his relationship to the owner through the former.

Their Lordships' judgment was delivered by

Lord Davey:—The suit out of which this appeal has arisen was one for recovery of some jungle land called Guljawari. This land was formerly the property of one Mohar Singh who died before the year 1847 and probably as early as 1835. The plaintiffs and present appellants claim to be the next of kin *ex parte paterna* and heirs of Mohar Singh. The defendants and respondents claim under a title derived from his widow Pritu who had been re-

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cognised as proprietor of the land at the Settlement of 1847. Pritu Bahadur. Singh v. Mohar Singh.
tu died in 1892 and thereupon the appellants claimed to succeed on the footing of her having had only a Hindu widow's estate and they allege that the alienation made by Pritu under which the respondents claim is invalid.

Issues were stated by the Subordinate Judge for the purposes of deciding the various questions which arise on the pleadings, the first issue being, "Are the plaintiffs entitled to bring the suit?"

All the issues were decided by the Subordinate Judge of Dehra Dun in favour of the plaintiffs, and by his decree dated the 31st January 1896 he ordered that the plaintiff's claim be decreed with costs. The decree was reversed in the High Court of the North-Western Provinces. The learned judges of that Court held that the plaintiffs had failed to make out their title as heirs of Mohar Singh and therefore allowed the appeal and dismissed the suit without considering the other issues in the case. The first question therefore is whether the plaintiffs have proved their title.

The appellants have adduced both documentary and oral evidence in support of their title. But before considering the evidence it will be convenient to state the outlines of the pedigree put forward by the appellants. They are the sons and grandsons of three brothers named Bishun, Sandal and Zorawar. These three brothers were the sons of one Narpat who was a direct descendant in the fourth degree of Hukmat, the alleged common ancestor. Mohar (it is said) was also descended in the fourth degree from Hukmat. His grandfather was called Chaini in the proceedings of 1847, but is referred to as Pertab in the pedigree now put forward.

The documentary evidence consists of the settlement proceedings in 1847 and 1866. It is a little difficult to follow the proceedings before the settlement officer in 1847. Zorawar and Bishun both filed petitions claiming possession of the Zemindari of Dain Adhoiwala which includes the lands in suit. The story told by the claimants was that the property had been jointly purchased by Chaini the grandfather of Mohar and Ratan the grandfather of the claimants, and that on a division, Chaini acquired Adhoiwala. Bishun said that Chaini and Ratan were own brothers; Zorawar described them as cousins. It is, however, apparent throughout

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these proceedings that the term 'brothers' is used in a loose sense. What is meant by both deponents is that they were members of one family. Zorawar in his deposition says, "now my right is this that Mohar Singh died leaving only his wife," and the ground on which they sought immediate possession was that Pritu had forfeited her estate by misconduct. There is not a trace on these documents of the effective assertion of any title by Pritu otherwise than as widow of Mohar and indeed the deposition of her Mukhtar Sahab Singh shows what her title was. Their Lordships think it plain that the three brothers were then claiming as the heirs of Mohar and in no other character.

Mr. Ross, Superintendent of the Settlement department, in his record of the proceeding before him stated that after perusing the papers and hearing the statement of the parties it appeared that both the parties, i. e., the husband of the person now in possession (Pritu) and the claimant were the descendants of a common ancestor and that Pritu was a widow having no heir or child. He further stated that Pritu being asked to state who would be the owner of her estate after her death, replied, "If Zorawar, Bishun and Sandal, the claimants, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate." Mr. Ross seems to have advised or put pressure on the claimants to act according to the condition alleged by Pritu and made an order accordingly.

The record of rights showing the shares in Dain Adhoiwala as prepared under Regulation IX of 1833 at the time of Settlement in 1848 is as follows: "As to the appointment of lambardar—after my death Zorawar, Sandal and Bishun who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me and one of them whom the Collector will think fit for lambardarship will be appointed lambardar."

These proceedings at least show that the claim of kinship now put forward is not a recent invention but was made nearly fifty years before the commencement of the present suit and was not

then seriously controverted if it was not in terms admitted. The learned Judges in the High Court decline to regard the statement of Pritu as an admission of relationship or recognition of the appellants' ancestors as her successors. The whole proceeding, however, is unintelligible on any other footing. Pritu could not designate her successors or bind the reversion after her death. On the other hand, unless the brothers were assumed to be the then heirs of Mohar they had no interest in the matter. Whatever was said or done is not of course conclusive upon the respondents or perhaps standing alone very strong evidence in favour of the appellants but their Lordships think it was a recognition on her part both that her husband's heirs (which is the character in which the three brothers claimed) were entitled to succeed her and also that she at any rate was not prepared to contest their claim to be such heirs. The rather unintelligible conditions which the three brothers were induced by Mr. Ross to acquiesce in as the price of a recognition of their title to succeed Pritu do not seriously detract from the general effect of the proceedings in 1847-48.

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The learned Judges seem to find some contradiction to the entry made at the settlement of 1847-48 in the statement made by Pritu in the record of rights and village administration paper of 1866-67.

"I have no heir to succeed me after my death. Therefore I cannot propose anything in regard to the office of lambardar"

This of course is strictly accurate if Pritu had only a widow's estate. Bishun, Sandal and Zorawar had claimed and the appellants now claim as heirs of Mohar and not as heirs of Pritu. This can hardly have been overlooked by the learned judges.

The only oral evidence which need be noticed is that of two of the plaintiffs and appellants, Hira and Bahadur. Hira is a son of Bishun and he states the descent of his father and mother from the common ancestor in the same way as was stated in 1847 except that he calls Mohar's grandfather Partab instead of Chaini. He says, he learnt the particulars of his family from his elders. He also says that he found an old genealogical tree in the house, but for some reason it was not produced and the respondents do not

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Mohar Singh. appear to have pressed for its production. If it had been produced it would of course have been treated with suspicion. The learned judge comments on his evidence because he does not know whether the father of Mohar Singh had any other son (it is not suggested that he had) or what was the name of the husband of Dando, the paternal aunt of Mohar, which seems a little hypercritical and also on the non-production of his genealogical tree.

Bahadur is the grandson of Zorawar from whom he says he obtained information about his family pedigree. He also speaks of the names of ancestors being called out on the occasion of marriages and says that in performing the ceremonies of sradh and tarpan, the names of the father, grandfathers and of all the ancestors he can remember are repeated. He adds a detail in the descent of Mohar from Hakumat Singh viz., that Nupa who was Mohar's great grandfather had three sons Chaini, Partab and Chaila ; this may account for the differences in the name of Mohar's grandfather in the pedigree of 1847 and that in the present suit. One brother may have been mistaken for the other. The variation is not a mark of unworthiness, but rather points to a more careful investigation.

There is also evidence that Pritu in her life-time was on good terms with the appellant's family and that Hira performed her funeral rights.

Both Hira and Bahadur were cross-examined at great length, but there is no suggestion throughout the cross-examination of any other person as a possible heir, nor is there any attempt to attack any particular link in the chain.

It is of course for the plaintiffs to make out their title and they can only succeed on the strength of their own title but, their Lordships think that the appellants have given admissible evidence which, in the absence of any counter evidence and in the circumstances, sufficiently supports their title. Mr. Cowell suggested that all statements made to the witnesses Hira and Bahadur since the year 1847 were inadmissible under section 22 (5)* of the Indian Evidence Act as being made *post litem*. It does not, however, appear

that the heirship of the then claimants was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case.

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This appeal was originally heard *ex parte* and the only question on which their Lordships were called upon to pronounce an opinion was whether the appellants had sufficiently proved their kinship. Subsequently the respondent obtained leave to appear and put in a case and their Lordships having heard the respondent are now in a position to dispose of the whole case.

The only additional point argued by Mr. Cowell on the respondent's behalf was that the appellants are estopped by what took place in 1847-8 from disputing Pritu's right to alienate the property. This argument fails both in fact and in law. There is no evidence of any representation on which to found an estoppel and even assuming that the arrangement made by Mr. Ross amounted to a contract between the then claimants and Pritu, such a contract is not binding on the appellants. According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of Mohar when the succession opened and it would be a novel proposition to hold, that a person so claiming is bound by a contract made by every person through whom he traces his descent.

Their Lordships have already intimated that they humbly advise his Majesty that the order appealed from be reversed and that the decree of the Subordinate Judge should be restored.

The respondents will pay the costs of this appeal including those of the first hearing.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Krishna Aiyar Appellant*
(Petitioner.)

v.

Muthusami Aiyar Respondent
(Counter-Petitioner.)

Krishna Aiyar v. Muthusami Aiyar. *Transfer of Property Act S. 89—Order absolute—Notice—Civil Procedure Code S. 248.*

When an application for an order absolute for sale under S. 89 of the Transfer of Property Act is made to the Court within one year of the date of the decree, no notice need be given to the judgment-debtor.

Appeal from the order of the District Court of Tanjore in C. M. A. No. 675 of 1900 presented against the order of the Court for the District Munsif of Mayaveram in M. P. No. 785 of 1900 (O. S. No. 216 of 1899).

S. Kasturiranga Aiyangar for appellant.

P. S. Sivaswamy Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—The application having been made within one year after the passing of the decree, no notice of the application for an order absolute for sale is necessary. Section 89 of the Transfer of Property Act does not require any notice to be given. We may add that the appellant does not show that he was in any way prejudiced by the want of such notice.

We dismiss the appeal with costs.

* A. A. A. O. No. 34 of 1901

26th November 1901.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Subbaraya Iyen

Appellant*

(Counter Petitioner,
5th defendant.)

v.

Padmanabha Vadhyar

Respondent (Petitioner 6th plaintiff.)

*Redemption—Delivery of title deeds on payment of money—Title deeds lost—Right to demand security from the judgment debtor.*Subbaraya
Iyen

v.

Padmanabha
Vadhyar.

In execution of a decree for redemption, the mortgagee judgment-debtor who had been directed to deliver the title deeds to the mortgagor decree-holder on receipt of the decree amount, but who having lost them was unable to return the same, cannot, in the absence of an express provision in the decree to that effect, be compelled to give security for the value of the property.

Appeal from the decree of the District Court of South Malabar in A. S. No. 527 of 1900 presented against the order of the Court of the District Munsif of Palghat, dated 21st June 1899 in M. P. No. 659 of 1899.

The respondents obtained a decree for redemption of a mortgage executed to the appellant. The decree directed as usual that on payment of the amount decreed, the appellant should re-convey the mortgaged properties and deliver the title deeds to the respondents. The amount was paid into Court. The appellant alleged that he had lost the title deeds and could not return them. The respondents thereupon asked that the appellant, if he could not deliver the title deeds, should be directed to furnish security to the value of the property. The Court accordingly directed the appellant to furnish the security before drawing the money from Court. Hence this appeal, on the ground that the decree only directed the delivery of documents in the *possession or power* of the appellant and did not provide for the taking of security if he could not return them.

P. R. Sundara Aiyar for appellant.

M. Bhaskara Menon for respondent.

The Court delivered the following

JUDGMENT:—There is no direction in the decree that the mortgagee in default of delivering up the title deeds of the pro-

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perty to the mortgagor should furnish security to the value of the property. The order directing security is, therefore, set aside and the respondent will pay the appellant's costs in this and in the lower appellate Court. The appellant's petition will be disposed of according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Rajagopala Tevar ... Appellant*
(Plaintiff).

v.

Sundara Nachiar and others ... Respondents
(Defendants).

Rajagopala
Tevar
v.
Sundara
Nachiar.

Hindu Law—Reversionary—Bandhu—Propinquity—Adopted son—Natural father—Nearness for succession.

Where a person has been removed from his natural family by adoption, his heirs should be sought for among those related to him in his new family and relationship in his natural family is of no account in the matter of succession.

Where two persons are equally entitled to succeed as bandhus to a deceased man in his adoptive family, the fact that one of them is more nearly related to the deceased in his natural family does not entitle him to succeed in preference to the other.

Appeal from the decree of the Additional Subordinate Judge's Court of Tinnevely in O. S. No. 14 of 1900 (O. S. No. 76 of 1899 on the file of the Subordinate Judge's Court of Tinnevely).

Plaintiff brought this suit as the nearest reversioner of the late minor Zemindar of Uttumalai for a declaration that certain alienations made by the Zemindar, the adoptive mother of the late Zemindar, were invalid and not binding on the reversion. The defence was that the plaintiff was not the nearest reversioner, that he had an elder brother who would preferably be entitled to succeed to the impartible Zemindari and that it was not competent to the plaintiff to sue for the declaration. The plaintiff contended that as he was the natural father of the deceased Zemindar in

addition to being his uncle, his claim was preferable to that of his elder brother. The Sub-Judge dismissed the suit holding that he was not the nearest reversioner and was not entitled to sue. Hence this appeal.

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Nachiar.

C. Sankaran Nair, T. Rangachariar and R. Sivarama Aiyar for appellant.

V. C. Desikachariar for 1st respondent.

K. Balamukanda Aiyar, and K. Jagannadha Aiyar for 2nd and 3rd respondents.

The Court delivered the following

JUDGMENT:—The question argued in support of this appeal is that the appellant who is a junior adoptive maternal uncle of the deceased adopted son of the 1st defendant is a preferential reversionary heir to his senior brother by reason of his being the natural father of the deceased adopted son, the estate in question being admittedly an impartible estate governed by the law of primogeniture. In illustration of this contention it was maintained that if the property had been partible, the appellant would be entitled to the whole of it, to the exclusion of his brothers. We consider the contention to be untenable. We cannot accede to the argument that in determining the degree of propinquity to the deceased adopted son in his adoptive family in which the question of reversionary succession arises, the appellant should be regarded as nearer of kin, because of his relationship as natural father—a relationship which for purposes of inheritance is entirely immaterial. It has been definitely decided in *Srinivasa Aiyangar v. Kuppen Aiyangar* 1, M. H. C. R. 180, that for mutual rights of succession an adopted son is completely severed from his natural family. None of the texts quoted to us is in conflict with that ruling.

It is unnecessary to consider or decide whether the natural relationship would be efficacious to intercept an escheat to the crown.

The appeal, therefore, fails and is dismissed with separate costs for each set of respondents except in regard to the vakil's fee of which each will get a moiety.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Sellamuthu Servagar Appellant*
(Defendant).

v.

Ramaswami Pillai Respondent
(Plaintiff).

Sellamuthu Servagar *Court fees—Accounts, suit for—Valuation—Larger sum found due—Additional duty demanded Dismissal for non-payment—Relinquishment.*

v.
Ramaswami Pillai.

In a suit for accounts, the valuation which the plaintiff puts upon his claim determines the jurisdiction of the court and the amount of court fees. In such suit a decree may be passed for a larger amount, though the decree cannot be executed until the fee is paid for the additional amount.

In a suit for accounts, on finding that a larger sum might be due than was claimed in the plaint, the court insisted on the payment of additional duty in the course of the suit. The plaintiff offered to relinquish his claim for the additional amount but the court held he had no power to relinquish the claim and dismissed the suit for default in paying the fee:—

*Held:—*that the order was erroneous and that the relinquishment made in consequence of such erroneous order was not binding on the plaintiff, especially as he had not been permitted to relinquish his claim.

Appeal from the decree of the Subordinate judge's Court of Madura, West in A. S. No. 185 of 1900, presented against the order of the Court of the District Munsif of Paramagudy, dated 27th January 1900, passed on O. S. N. 658 of 1896.

The suit was for taking accounts of a partnership between the plaintiff and the defendant to work a toddy lease from the Zemindar of Ramnad. The plaintiff in his plaint valued his claim at Rs. 2,493-12-0, and the defendant while denying any partnership of the kind alleged by the plaintiff pleaded that the proper court fee had not been paid. The District Munsif overruled the objection and after trying the case on the merits gave judgment for the plaintiffs for 1200 odd rupees. The defendant appealed and the objection to the court fee paid was repeated before the Subordinate Judge who heard the appeal. He held that the suit had been properly valued

and proper court fee paid ; he eventually remanded the suit directing the lower Court to pass a decree after taking all the evidence in the case. When the case again came before the District Munsif, the plaintiff stated that about a thousand rupees might be due to him over and above the amount claimed in the plaint. The District Munsif took a statement to that effect from the plaintiff and directed him to pay the additional court fee within a day named in his order. The plaintiff did not pay it within the time fixed by the court but offered to relinquish his claim for the Rs. 1,000. The District Munsif held that though the plaintiff might relinquish any portion of his claim at the institution of the suit, he had no right to relinquish afterwards and dismissed the suit. On appeal the Subordinate Judge held that the question of the propriety of the court fees paid had been disposed of by him on the previous occasion and that the District Munsif had no business to re-open that question again ; he therefore remanded the case again for disposal according his previous order. Against this order of remand, the present appeal was instituted.

Sellamuthu
Servagar
v.
Ramaswami
Pillai.

P. R. Sundara Aiyar for appellant.

P. S. Sivaswamy Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The order of the Subordinate Judge is right, as the District Munsif's order requiring the plaintiff to pay stamp duty on an additional sum of Rs. 1,000 when the case was formerly remanded was clearly erroneous. In a suit for an account like this, the valuation first fixed in the plaint is final for purposes of jurisdiction and stamp duty on the plaint, but does not preclude the plaintiff from getting a decree for such higher amount as the accounts may show he is entitled to. He must, however, pay extra stamp duty in execution on such higher amount.

We may add that the relinquishment by the plaintiff made in consequence of such erroneous order of the District Munsif, will not bind him, especially where, as in this case the District Munsif has refused to allow the plaintiff to make the relinquishment.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

C. Srinivasan Petitioner*
(Accused).

v.

The King Emperor Respondent.

Srinivasan
v.
The King
Emperor.

Indian Penal Code ss. 420 and 488—*Cheating—Forgery—Wrongful gain—Wrongful loss—damage or harm—Attempt.*

Where a person was charged with cheating the Registrar of the University of Madras by passing himself off for another person and trying to obtain a duplicate of the matriculation certificate of that other person :—

Held that there was no proof of harm or damage to the Registrar or to the University and no wrongful gain to the accused or loss to the University and that therefore the charge of cheating must fail

Where he was also charged with forgery of a document for the purpose of obtaining a duplicate copy of the certificate.

Held that the charge of forgery must also fail because there was no evidence that he forged dishonestly or fraudulently and with intent to cause damage or injury to the public or to any one.

The attempt to obtain University certificate with the object of using it as his own subsequently for the purpose of obtaining a temporal advantage is a mere preparation not indictable as an attempt within the meaning of S. 511, I P. C.

Petition under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the Sessions Court of South Arcot in Criminal Appeal No. 75 of 1901 presented against the finding and sentence of the Deputy Magistrate of Cuddalore Division in Calender Case No. 74 of 1901.

In this case the accused was charged with forgery and cheating. The facts were as follows :—On the 15th March 1901, the Registrar of the University of Madras received an application for a duplicate copy of the Matriculation Certificate which the applicant alleged he had lost in a burglary in his house. With this application was forwarded a certificate of identification from the Head Master of the High School, Mayavaram where he had received his education. The application was signed by "S. Srinivasan" who further requested that communications to him should be addressed to the care of one Krishna Reddi in Cuddalore. On receipt of this application, the Registrar in a letter addressed to the applicant to

the care of the said Krishna Reddi asked him to send the receipt ^{Srinivasan} for the usual fee payable for duplicate certificate. The fees was ^{V. The King Emperor} duly paid into the treasury and the receipt forwarded to the Registrar. Thereupon the Registrar sent the certificate to the Head Master of the High School, Mayavaram, for delivery to the applicant. The Head Master who was not conscious of having given any certificate of identification to any pupil of his, wrote to Krishna Reddi asking him to direct the applicant to come in person and take the certificate from him. In the meanwhile the Head Master saw the real S. Srinivasan and learnt from him that his certificate was never lost and that he had made no application to the Registrar for a duplicate certificate. He therefore returned the certificate to the Registrar with an intimation that some fraud upon the University was on foot. The Registrar sent a registered letter to "S. Srinivasan, care of Krishna Reddi" directing him to go to the Head Master of the High School at Mayavaram and take the certificate. At the same time the Registrar put himself in communication with the District Magistrate who directed a policeman to watch and ascertain who received the registered letter. The accused took delivery of this letter in a shop where he was buying some things at the time and signed the acknowledgment. Later in the day he was arrested and on searching Krishna Reddi's house, some letters connected with this affair were found.

The Head Master who was examined as a prosecution witness and who deposed that the accused was his student and failed a number of times in the Matriculation Examination was not able to speak to the handwriting of the accused. The officer of the treasury could not say that it was the accused who paid the money into the treasury. But Krishna Reddi deposed that the accused had asked him to receive communications for him and that he now and then came to his house and looked into the letters taken on search and left them there. On the strength mainly of the evidence of this witness and of the similarity of the handwriting of the accused to the handwriting in the application and certificate of identification, the Magistrate convicted him of cheating and forgery and sentenced him to two years' imprisonment.

On appeal the Sessions Judge agreed with the Magistrate on the conclusion of fact; but being of opinion that there was no

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cheating but only an attempt to cheat reduced the sentence to one year's imprisonment. Hence this revision petition on the ground that the conviction for forgery was illegal inasmuch as it was based solely on a comparison of handwriting and that the evidence of Krishna Reddi who was an accomplice if the prosecution story was true ought not to have been believed.

John Adam and T. Rangaramunujachariar for the petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The charge of cheating must fail inasmuch as there is no proof that the deception practised by the petitioner on the Registrar of the Madras University caused harm or damage to him or to the University which he represents. If the real S. Srinivasan had practised a similar deception for obtaining a duplicate certificate, it could not be argued that he would be guilty of cheating unless damage or harm was caused to the person deceived.

There is also nothing to show that the petitioner acted dishonestly in obtaining the duplicate certificate, that is, that he had any intention of causing wrongful gain to himself or wrongful loss to the University. On the other hand, he paid three rupees in cash for the certificate, which certainly seems to be greatly in excess of its cost price.

Then as to the charge of forgery, assuming that the petitioner fabricated the document B 2, there is no evidence, for the reasons already stated, that he did so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before us is not whether he intended to use the certificate subsequently in order to obtain some temporal advantage by pretending that he had passed the Matriculation examination. Had he had such intention, this mere preparation towards such object would not amount to an attempt to commit an offence within the meaning of Section 511 of the Penal Code.

We must therefore reverse the conviction, acquit the prisoner and direct that he be set at liberty.

Queen Empress v. Haradhan, I. L. R., 19 O. 360 *Queen Empress v. Abbas Ali*, I. L. R., 29 O. 912, *Queen Empress v. Soshi Hushan*, I. L. R., 19 A. 210. *Queen Empress v. Appasami*, I. L. R., 12 M. 107.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Shephard and Mr. Justice Boddam.

Chinna Krishna Reddi Appellant*
(Plaintiff).

v.

Dorasami Reddi Respondent
(1st Defendant).

Civil Procedure Code S. 43 Contract of sale—Suit for specific performance—Conveyance—Subsequent suit for possession—Parties—Representatives—Bar. Chinna Krishna Reddi v. Dorasami Reddi.

Where under an agreement to sell land the vendee was entitled to immediate possession or the right to a conveyance and the right to possession arose coincidentally, the vendee cannot first bring a suit for a conveyance and afterwards another suit for possession. But where the right to possession arose only on the execution of the conveyance in the previous suit, a fresh suit for possession is not barred by section 43 of the Code of Civil Procedure.

In a previous suit against the 1st defendant alone, the plaintiff got a conveyance executed by him on behalf of himself and his minor brothers, defendants 2 to 4. In the present suit to recover possession brought against all the brothers, S. 43, O. P. C., was pleaded in bar of the suit :—

Held, that if S. 43 was a bar to the suit as against the 1st defendant, it was equally a bar to it as against defendants 2 to 4.

Second Appeal from the decree of the District Court of Chingleput in A. S. No. 340 of 1898, presented against the decree of the Court of the District Munsif of Chingleput in O. S. No. 448 of 1897.

In consideration of pecuniary and other help rendered by the plaintiff to the defendants in connection with a litigation of theirs, the 1st defendant on behalf of himself and his minor brothers, defendants 2 to 4, agreed to sell certain lands to the plaintiff. He actually executed sale deed in 1890 but before registering the document, got possession of the same and fraudulently refused to register it. In 1891, the plaintiff brought a suit to have a fresh sale deed executed and registered by the 1st defendant. Both the Lower Courts having dismissed the suit on the ground that the vendor had done all he was bound to do when he executed the first document, the High Court reversed their decision and allowed the plaintiff's suit. See 20 M. 19. In execution of that decree the plaintiff had a proper instrument executed by the 1st defendant on behalf of himself and his brothers. The defendants having still failed to put the

* S. A. 1311 of 1899.

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properties in his possession, the plaintiff brought the present suit to recover possession of the properties. The defendants pleaded that S. 43 was a bar to the suit. The defendants 2 to 4 pleaded in addition that the 1st defendant was not their guardian and had no business to sell the lands to the plaintiff on their behalf. The District Munsif dismissed the suit as barred by S. 43, C. P. C. On appeal, the Judge affirmed the decision in so far as the 1st defendant's share was concerned but reversed the decision as regards the other defendants and remanded the suit for trial on the merits as to whether they were bound by the contract of the sale entered into by the 1st defendant. The judge held that as defendants 2 to 4 were not parties to the previous suit, S. 43 could not be pleaded by them in was of the suit. The plaintiff appealed on the ground that the suit was not barred by S. 43; and the defendants 2 to 4 appealed against the order of remand on the ground that if the suit was barred as against the 1st defendant, it was likewise barred as against them as the 1st defendant was sued in the previous suit in a representative capacity.

P. B. Sundara Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—We have no materials for deciding whether the claim for possession ought to have been made in the previous suit. If under the contract for sale the plaintiff was entitled to immediate possession or if the rights to possession and a conveyance arose coincidentally as in *Narayana Kavirayan v. Kandasami Goundan*, I. L. R. 22 M. 24, the judgment is right.

On the other hand it may be that the plaintiff acquired his right to possession only under the conveyance and that is the claim he makes. As it is alleged that the 1st defendant represented the defendants 2 to 4 in the original suit and that they are therefore bound by the decree therein, any bar which operates in favour of the 1st defendant must equally avail to the other defendants.

We must, therefore, set aside the order and direct the District Munsif to re-try the case.

Costs will abide the event.

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT).

Present:—Lord Macnaghten, Lord Robertson and Lord Lindley.

Dinobundhu Shaw Chowdhry *Appellant.**

v.
Jogmaya Dasi and others *Respondents.*

Civil Procedure Code S. 276—Attachment—Prior mortgages—Discharge by mortgagor from money raised on a fresh mortgage—Execution sale—Priority of mortgage over sale—Intention Dinobundhu Shaw, Chowdhry *v.* Jogmaya Dasi.

Section 276, C. P. C., does not render all alienations by the judgment-debtor void so as to confer a benefit on the judgment-creditor which he never had at the time of the attachment and which it was not intended he should have subsequent thereto but only those which prejudicially affect the judgment-creditor.

An attachment of property over which there is a mortgage subsisting affects only the equity of redemption. A payment of the mortgage by a person claiming under the judgment-debtor or by the latter on behalf of that other with the intention of keeping alive the old mortgage does not enure for the benefit of the execution-creditor just as a further advance or a subsequent mortgage in renewal of the prior mortgage will not affect him prejudicially under S. 276, C. P. C.

When an owner of an estate pays charges on the estate for which he is not personally liable, the question whether such payment operates as an extinguishment of such charges or otherwise, depends upon the intention of the parties. An intention to keep alive the prior charges will be presumed when it is for the benefit of the person paying. Payment by a judgment debtor of his own charges pending attachment for the benefit of a person who has advanced the money and under an agreement with him operates to keep alive such charges for the benefit of the person who has so advanced.

Where a judgment-creditor while the attachment on the equity of redemption was pending mortgaged his estate to pay off prior charges created before the attachment and out of the mortgage amount paid off such charges and got a re-conveyance from the holders of the prior charges and the re-delivery of the title deeds together with the documents creating the charges and delivered all such to the mortgagee in pursuance of an agreement with the latter who was to have the first charge on the property represented to be unincumbered.

Held, that the judgment-creditor could not claim to have the benefit of this payment and a purchaser with notice of these facts in the execution sale could only take a title subject to the mortgage.

Their Lordships' judgment was delivered by

Lord Lindley:—The question in this appeal is whether a purchase of property by the appellant at a sheriff's sale is subject to or freed from a prior lien claimed by the respondents.

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On the 5th October 1891 the property in question was attached by the sheriff of Calcutta at the suit of a judgment-creditor. At that time the property was subject to two mortgages created by the execution-debtor *viz.*, (1) a mortgage dated the 22nd June 1888 for Rs. 25,000 bearing interest at 15 per cent; and (2) a mortgage dated 9th August 1890 for Rs. 3,000 bearing interest at 24 per cent. The attachment in no way affected these mortgages. It affected the execution-debtor's beneficial interest in the property attached; in other words the equity of redemption and nothing else.

At the time of the attachments the mortgagor was making arrangements with one Mustaphi (the predecessor of the respondents in the present proceedings) for an advance of Rs. 40,000 at 12 per cent. to enable him *i. e.*, the mortgagor, to pay off the two above mentioned mortgages and for other purposes. The mortgagor was to obtain the deeds from the mortgagee and to hand them over to Mustaphi and give him a mortgage for his advance of Rs. 40,000 and interest at 12 per cent. It is obvious that if this arrangement had been carried out in English fashion by a skilful conveyancer the old mortgages would have been kept alive and transferred to Mustaphi and provision would have been made for reducing the interest and for securing the excess of Rs. 40,000 advanced over the amount due on the mortgages paid off. If this had been done, the position of the execution creditor would have been unaffected in any way. He would have gained nothing by the payment off of the old mortgages, and he would have lost nothing either by that payment or by the further advance which would not have affected him. (See S. 276 of the Code of Civil Procedure).

Transfers of mortgages are apparently not so common in India as in this country; and what was done was that the mortgagor paid off the old mortgages, took a re-conveyance to himself and then executed a fresh mortgage bond for Rs. 40,000 to Mustaphi. This mortgage bond is dated 7th October 1891 and is set out in the record at page 31. The bond recited the two old mortgages and the loan of Rs. 40,000 to pay them off and charged the property with that amount and interest at 12 per cent. The bond stated that the property was not subject to any attachment by the Court and if it should appear that there was any charge on the property then the Rs. 40,000 and all interest should become immediately payable. The bond also contained a clause as follows:—"I promise that after

re-paying the money due on the aforesaid two mortgages I shall cause a re-conveyance of those properties to be executed and registered and shall make over to you the mortgage deeds which I shall get back." Dinobundhn
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This arrangement was carried out; the Rs. 40,000 were advanced; the two mortgages were paid off; the property comprised in them was re-conveyed to the mortgagor; he got the deeds and handed them to Mustaphi. This was done on the 8th October 1891 the day after the mortgage bond was executed. Probably at this time the mortgagor was not aware of the attachment.

Pausing here for a moment, nothing can be clearer than that the intention of the parties to this transaction was to give to Mustaphi a charge for Rs. 40,000 on the property in question in priority to all other charges if any. The property being represented as unincumbered the statement in the judgment of the High Court that it was intended to keep the two old mortgages alive is open to criticism. But it does not affect the substance of the case. The respondents were intended to have the first and only charge, and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution-creditor or any purchaser at the sheriff's sale.

Subsequently to this transaction, viz., in July, 1892, part of the property mortgaged was sold under the execution to the appellant. As will be shown presently, he was not a purchaser for value without notice of the respondent's security. He claimed, however, to be entitled to the property bought free from all incumbrances. Thereupon Mustaphi having died this suit was instituted by his widow claiming a lien for the full amount of their mortgage bond. She died pending the suit which was continued by the respondents, and they obtained a decree in their favour. On an appeal this decree was affirmed but was modified without objection on the part of the respondents by limiting their lien to the amount actually applied in paying off the two old mortgages. From this decree the appellant has again appealed.

Counsel for the appellant contended that the appellant had no notice of the real facts when he bought; and that the only notice he had was that conveyed by the proclamation referred in the official sale certificate of the Registrar set out in the record at

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p. 69. According to this certificate notice was given of the old mortgage on the 22nd June 1888 and of its payment off and of the mortgage for Rs. 40,000 on the 7th October 1891, two days after the attachment. Nothing is said about anything more. The certificate was apparently given pursuant to S. 316 of the Civil Procedure Code. It appears from the evidence that the appellant was distinctly informed of both mortgages and of their payment off out of the Rs. 40,000 advanced by Mustaphi and of his widow's claim to a lien on the property. Both the Subordinate Judge and the High Court held that the appellant had full knowledge of the real facts of the case when he bought the property, and their Lordships are of the same opinion.

The next and main contention raised by counsel for the appellant was that the two old mortgages were extinguished by the mode in which they were dealt with. The answer given in both courts to this contention was that so to hold would be to defeat the obvious intention of the parties to the transaction. Their Lordships have already stated that this is the conclusion at which they have themselves arrived. The law upon this subject and its application to transactions in India will be found in *Mohesh Lal v. Mohunt Bawan Das*, L. R., 10 I. A. 62, and *Gokuldoss Gopaldoss v. Rambux Seochand*, L. R., 11 I. A. 126. The Subordinate Judge has summed it up accurately thus "When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot." Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustaphi and in performance of the agreement with him.

As already stated the intention of the parties in this case was to give Mustaphi a first charge on property represented to be unincumbered and the appellant knew it.

The last point urged by the appellant's counsel was that whatever the intentions of the parties may have been, section 276 of the Civil Procedure Code rendered the mortgage for Rs. 40,000

wholly void as against the appellants. So to construe this section would be quite wrong. So far as the mortgage for Rs. 40,000 prejudiced the execution-creditor it is void as against him; but the section does not render void transactions which in no way prejudice him; and to hold the mortgage void so as to confer upon him a benefit which no one ever intended he should have is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an execution-creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties.

Their Lordships will therefore humbly advise His Majesty to dismiss this appeal and the appellant must pay the costs of it.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[FROM THE CHIEF COURT OF THE PUNJAB].

Present.—Lord Macnaghten, Lord Robertson, and Lord Lindley.

Ghulam Jilani and others . . . *Appellants.**

v.

Mahammad Hassan . . . *Respondent.*

Civil Procedure Code, Ch. XXXVII, Sections 521, 522—Award—Error of Law—Ghulam Jilani
Application to set aside—Limitation Act XV of 1877, Art 158, Sch. II. and S. 12
Appeal—Revision—Section 622, C P. C.

v.
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Arbitrators are Judges of law and fact, and mere error of law on their part even on a question whether the court has jurisdiction to entertain the suit does not vitiate the award. They may give an award on the whole case or on each point.

No appeal lies where the decree based upon the award is not in excess of or not in accordance with the award; and much less a revision under section 622.

Obiter:—An application to set aside the award (and an application in revision in such) must be made within 10 days from the time the award is submitted to the court subject to the deduction of the time requisite for obtaining a copy of the award as prescribed in section 12, Limitation Act, of 1877. A court is bound to take notice of a point of limitation even though no plea is raised by the parties.

Effect of Ch. XXXVII, C. P. C. considered.

Judgment of Clerk, J. in 84 P. R. 1901 approved.

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Their Lordships' judgment was delivered by

Lord Macnaghten :—The object of this appeal is to set aside an award which was made on reference to arbitration with the view of determining the rights and interests of the parties to this litigation in two Government leases.

The appeal is against two decisions of the Chief Court of the Punjab. The one determined that no appeal lay from the decree of the Subordinate Judge made in accordance with the award. The other was passed on revision. It varied the decree but only in a matter of little or no practical importance.

The question appears to their Lordships to turn upon the true construction and effect of the provisions of the Code of Civil Procedure relating to arbitration. The decisions of the Indian Courts on those provisions are so conflicting that it may be useful to state generally the conclusions at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument.

The chapter in the Code of Civil Procedure on *Reference to Arbitration* (Chapter XXXVII) deals with arbitrations under three heads:—

I. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court.

II. Where the parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court.

III. When the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award.

Full directions are to be found in the Code as to the course of procedure in cases falling under Head No. I and large powers are given to the Court with the view of making the award in such cases completely operative and final. The Court makes an order of reference on the agreement (which must be the agreement of all parties to the suit) being brought before it and fixes a time for the

delivery of the award with power to enlarge the time if necessary. When the award is submitted to the Court, the Court may in certain specified cases correct or modify it subject to a right of appeal. In certain specified cases it may remit the matter to the arbitrators or to the umpire as the case may be. No award is to be set aside except in one of three cases specified and defined in section 521. It is to be observed that by the Limitation Act, schedule 2, Article 158 the period of limitation prescribed for an application under the Code to set aside an award is a period of 10 days only from the time when the award is submitted to the Court exclusive of the time requisite for obtaining a copy of the award (Limitation Act, section 12). Then comes section 522 which provides that if the Court sees no cause to remit the award and if no application has been made to set aside the award or if the Court have refused such application the "Court shall after the time for making such application has expired proceed to give judgment according to the award." It is enacted that "upon the judgment so given a decree shall follow" and shall be enforced in manner provided in the Code for the execution of decrees. At the end of the section there are these important words. "No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

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Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under section 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of appeal in respect of matters of fact or in respect of matters of law (see *Adams v. Great North of Scotland Railway Company*, 1891, A. C. 81.)

In cases falling under Heads II and III, the provisions relating to cases under Head I are to be observed so far as applicable. But there is this difference which does not seem to have been always kept in view in the Courts in India. In cases falling under Head I, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned

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and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceeding up to that point. In cases falling under Heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code.

Now, the agreement of reference in the present case was made in the course of litigation. The respondent who has not appeared on this appeal was plaintiff. The appellants were defendants. The plaintiff's case was that his father had been promised by the Government a lease of 4,000 acres to be granted at once and an additional lease of 2,000 acres on the completion of a canal intended to irrigate the lands to be leased. According to the plaintiff's story on his father's death he admitted the father of the defendants to a one-fourth share in the adventure on the terms of his finding the money required to bring the land into cultivation. The lease of the 4,000 acres was granted to the two adventurers. The father of the defendants found the money for the construction of the canal and got the lease of the additional 2,000 acres granted to himself alone. The plaintiff alleged that the profits of the canal had more than covered the expenses of construction, and inasmuch as under the second lease the defendants were in possession of 500 acres in excess of their proper share, he claimed that the defendants should make over to him their interest in the first lease of 4,000 acres as well as three-fourth share in the canal and accounts for profits in excess of their proper share. The defendants case was that it was arranged in consideration of the defendant's father finding all the money that the plaintiff should be content with 200 acres only. The defendants further objected that the suit was not competent and that so much of the claim as asked for a share of profits and a settlement of accounts was excluded from the cognizance of the Civil Court by the Punjab Tenancy Act of 1887, section 77, Cl. K. The issues as settled were twelve in number including the following. "No. 2. Whether the whole or any part of the claim is not cognizable by a Civil Court?" Then the parties went

into evidence but before the case was heard they agreed to refer all matters in dispute to two arbitrators one named by each party. An order of reference was duly made by the Court. The arbitrators named by the parties took upon themselves the burden of the reference and they concurred in an award which on the face of it seems to be a fair and reasonable settlement of the matters in dispute. The award was duly submitted to the Court. Both parties objected to it. The plaintiff raised some minor objections. The defendants objected to the whole award. The Subordinate Judge overruled all objections and in due course pronounced a decree in accordance with the award.

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From the decree of the Subordinate Judge the present appellants, the defendants in the suit, appealed to the Chief Court of the Punjab. The Court sitting as a Full Bench held that no appeal lay. In that decision their Lordships entirely concur though it appears from a case which was cited by Sir William Rattigan 84 P. R. 1901 that a subsequent Full Bench of the same Court has disapproved of the rulings of the Full Bench in the present case.

Unfortunately in dismissing the appeal it was suggested by the Full Bench that although an appeal would not lie from the decree of the Subordinate Judge an application might be made in revision under section 622 of the Code. Accordingly, the appellants were permitted to present an application in revision under that section.

The Court heard the case in revision and altered the decree in a manner which might have been proper if the Court had jurisdiction to interfere in the matter. The alteration satisfied the appellants even less than the original decree.

Their Lordships are inclined to agree with view of Clerk, J. in 84 P. R. 1901 that in the case of an award revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present, the finality of any award would be open to question. Their Lordships, however, are of opinion that such an application is incompetent. The application in revision in the present case was avowedly an application to set aside the award. As such it was plainly prohibited by the Limitation Act of which the Court is bound to take notice though no objection is made by the parties. In the next place, even if the application had been

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in time, it could not in their Lordships' opinion be brought under Section 622. The question whether the suit was competent was one of the issues in the suit and as such referred to the arbitrators. They were not, indeed, bound to give an award on each point. They had to give their award on the whole case. In point of fact, however, they did decide the question. They may have erred in law but arbitrators may be judges of law as well as judges of fact and an error in law, certainly, does not vitiate an award. The award having been duly made and not having been corrected or modified and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in accordance with it. The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the code.

Inasmuch as their Lordships hold the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court. It is enough to say that in their Lordships' opinion there does not appear to have been any substance in any one of them.

The logical result of the view which their Lordships have expressed would be to restore the decree of the Subordinate Judge. But inasmuch as the decree as altered is probably in the form which it would have taken if the award had been corrected or modified, their Lordships think the better course will be simply to dismiss the appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

IN THE JUDICIAL COMMITTEE OF PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT.)

Present :—Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley.

Denomoni Chowdhrami Appellant.*

v.

Brojo Mohini Chowdhrami Respondent.

Evidence—Criminal Procedure Code S. 145—Order as to possession, effect of—Admissibility of order—Possession—Burden of proof—Indian Evidence Act S. 13—Report—Map—Admissibility—Extrinsic evidence—Boundary-dispute—Privy Council Practice. Denomoni Chowdhrami v. Brojo Mohini Chowdhrami.

An order under S. 145 of the Code of Criminal Procedure does not confer any title on the person in whose favor the order is made. The person declared by the order to be in possession is, however, entitled to retain such possession until he is evicted by a person who can prove a better title or who can prove a better right to possession.

Orders under S. 145 are, on general grounds and under S. 13 of the Evidence Act, admissible even as against other persons not parties to the order to prove the fact of the passing of such orders, the parties to the dispute, the land in dispute and the person declared entitled to possession. If the order describes the lands by metes and bounds or with reference to physical marks, extrinsic evidence is admissible to prove their identity. If maps accompany such orders, maps are admissible to explain the orders and extrinsic evidence is admissible to identify the objects shown in the map. Reports accompanying the orders or maps but not referred to in the orders are admissible as hearsay evidence of reputed possession or if they satisfy the provisions of S. 13 of the Evidence Act.

In a case of disputed boundary it is not enough for the appellant to throw doubts upon the respondent's case or to show that the respondent's title is not free from doubt, but the appellant must show clearly where the judgment of the appellate court is wrong and what other course is right.

The respondent in this case brought this suit as widow and executrix of one Haranath Chowdhry who died in 1834 to recover possession of certain alluvial lands formed by a change in the course of the river Brahmaputra. The appellant and the respondent were owners of adjacent villages and the question was whether the plaint lands formed part of the appellant's or the respondent's villages. There were disputes as to possession of certain properties in the years 1867, 1876 and 1888. In the years 1867 and 1876 on proceedings taken under the provisions of the Code of Criminal Procedure then in force corresponding to S. 145 of the present

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code, the Magistrate upheld the possession of the plaintiff's husband. In the year 1888, the dispute was in reference to the possession of the plaint lands between the appellant and the respondent; and the order of the Magistrate which was in favour of the appellant was affirmed by the High Court. The plaintiff's allegation was that the orders of 1867 and 1876 related to these very lands, that she and her predecessor had held possession of the lands for over twelve years before 1888 and that she was entitled to these lands. The defendant denied that the plaint lands were the subject of the dispute in 1867 and 1876 and stated that they were submerged before 1852 and could not have been held adversely by the plaintiff. The defendant also relied on the order of 1888. After the settlement of issues an amin of the Court was deputed to prepare a map showing the various villages, the area of the disputed lands and to ascertain whether the lands in dispute in 1867 and 1876 were the same as the plaint lands in whole or in part. The amin reported that the plaint lands did not form part of the respondent's villages and that the orders of 1867 and 1876 did not relate to them. The Subordinate Judge dismissed the suit, holding that accretion to, or formation upon, the plaintiff's lands was not made out, that the claim of adverse possession was not supported by the police orders nor otherwise established and that, on the other hand, the defendant had established his possession for over twelve years. The plaintiff appealed to the High Court. The High Court admitted in evidence the proceedings of 1876 which the Subordinate Judge had rejected as inadmissible against the defendant who was not a party to them and also a map produced by the plaintiff; and finally, passed judgment for the plaintiff for the major portion of the lands claimed in the plaint and mesne profits. From this decree the defendant appealed to the Privy Council.

Lord Lindley after stating the facts as above, delivered the judgment of the Judicial Committee as follows :—

The appellant's main contention is that having been in possession at the time of and under the order of 1888 the onus is on the plaintiff to prove her title to the land in dispute and that she is unable to do so; and that she has failed to prove the identity of the land claimed or any part of it with land to which she or her late husband had or have any title by possession or otherwise.

Before considering the merits of this controversy, it is desirable to clear the ground by determining the effect of the orders made in May 1867, June 1876 and December 1888. (The order of 1888 is not in the record). These orders are merely Police orders made to prevent breaches of the peace. They decide no question of title; but under S. 145 of the Criminal Procedure Code of 1882 (relating to disputes as to immoveable property) the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute; and if he decides that one of the disputants is in possession the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect.

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These police orders are in their Lordships' opinion admissible in evidence on general principles as well as under section 13 of the Indian Evidence Act to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, *viz.*, who the parties to the dispute were; what the land in dispute was and who was declared entitled to retain possession. For this purpose and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands described in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence *i. e.*, the testimony of persons who know the locality. If the orders refer to map, that map is admissible in evidence to render the order intelligible; and the actual situation of the objects drawn or otherwise indicated on the map must as in all cases of the sort be ascertained by extrinsic evidence. So far, there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession (2 Tay. Ev. section 517). But they are not otherwise admissible unless they are made so by S. 13 of the Indian Evidence Act. To bring a report within that section the report must be a report of a transaction in which the right or custom in question was ascertained, modified, recognised, asserted or denied or

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which was inconsistent with its existence." These words are very wide, and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the High Court did not err in receiving the report made in the proceedings of 1876 to the reception of which Mr. Cohen objected.

As regards possession under a Magistrate's order, although the order confers no title, the fact of possession remains and the person can only be evicted by a person who can prove a better right to the possession himself. The order of 1888 and possession under it threw upon the plaintiff the burden of proving her title; and she did so to the satisfaction of the High Court so far as the larger part of the land in dispute is concerned. But the onus is not now on her to show that the judgment in her favour is right; it is for the appellant to show that it is wrong and where and why it is wrong. See as to the orders *Ambler v. Pushong*, I. L. R., 11 C. 365.

Some valuable observations on this point will be found in *Raj Coomar Roy v. Gobind Chunder Roy*, L. R., 19 I. A., 140, where boundaries could not be accurately ascertained. It was there said (*See* p. 147) that to induce this Board to reverse the judgment appealed from, the appellant must do something more than show that the plaintiff's title is not free from doubts; the appellants must at least give some acceptable explanation of the circumstances which have led the court below to its conclusion. Their Lordships adopt this principle.

[His Lordship then considered the orders of 1867 and 1876 and held that the portion of the lands for which the High Court had given the plaintiff a decree was covered by the order of 1876 and after discussing the evidence as to possession proceeded as follows :—]

No possession by the defendant before 1883 is proved. The real truth is that the defendant's case is based on the order of 1883 and on the defendant's possession since that date, and on the inability of the plaintiff to prove a better title to the land she claimed. The Subordinate Court thought she failed to do so. The High Court took a different view as to the greater part of the land. Their Lordships have studied the whole evidence afresh.

there are many details which they cannot say are free from obscurity still their Lordships have come to the conclusion not only that the decree of the High Court ought not to be disturbed, but that it is right.

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Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs of it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Pydal Nambiar and another . . . Appellants *
(Plaintiffs).

v.

Kannan Nambiar and others . . . Respondents
(Defendants and
Legal Repts. of
3rd defendant).

Court-Fees Act Sec. 7, Cl. C.—Suit to enforce registration—Declaration—Consequential relief—Proper fee. Pydal Nambiar

A suit to enforce registration of a document under section 77, Act III of 1877, is not a suit for a mere declaratory decree but one in which consequential relief is prayed for. The proper stamp fee must be calculated with reference to the amount at which the relief is valued under section 7, Cl. IV-C., Court Fees Act. Kannan Nambiar.

Appeal from the decree of the District Court of North Malabar in O. S. No. 15 of 1899.

Three separate suits were brought by three different plaintiffs claiming under three different gifts from one Ammani Ammal, deceased, to enforce the registration of such gifts. The defendants' contentions were that Ammani Ammal was not in a fit mental condition to make the gifts, being suffering from acute illness and having lost all consciousness and that the gifts were subsequently concocted. The Registrar refused to register the documents. The plaintiffs in the three suits brought three different suits to enforce registration under section 77 of the Registration Act.

C. Sankaran Nair for appellants.

The Government Pleader (E. B. Powell) for 5th respondent.

Pydal v.
Nambiar
Kannan
Nambiar.

The Court delivered the following preliminary
ORDER :—We are of opinion that these are not suits for
declaratory decrees and that consequential relief is prayed for.

The institution fee is, therefore, to be calculated under section 7,
clause IV-c according to the amount at which the relief sought is
valued in the plaint.

The stamp duty paid is only Rs. 10 in each case, and is insuffi-
cient. The proper stamp duty on the appeal must be paid within
three weeks from to-day.

After payment the appeals will be posted for disposal.

The valuation in each case has been stated in the plaint.

[The *ad valorem* duty was paid and the appeal was again
posted for hearing on the merits before the same Bench, on 8th
November 1901, when judgment was given dismissing the appeal
on the merits].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Moore.

Savarimuthu Pillai Appellant*
(Plaintiff).

v.

Alagiam Pillai and others Respondents
(Defendants).

Savarimuthu
Pillai
v.
Alagiam
Pillai.

*Suit to enforce Registration—Court Fees Act VII of 70, Sch. IV, Art. 17, cl.
12—Proper stamp for suit and appeal.*

The proper Court fee payable on a plaint and a memorandum of appeal
against a decree in a suit to enforce registration of a document under sec-
tion 77, Act III of 1877, is a fixed fee of Rs. 10 only and not *ad valorem* on the
value of the properties comprised under the document.

Juntoo v. Raja Cante Doss, I. L. R., 8 C. 315, followed.

Pydal Nambiar v. Kannan Nambiar, 12 M. L. J. R. 87, not followed

Appeal from the District Court of Trichinopoly in O. S. No. 11
of 1899 (O. S. No. 49 of 1898, Sub-Court's file).

V. Krishnaswami Aiyar and *A. Nilakanta Aiyar* for
appellant.

C. Sankaran Nair and *S. Srinivasa Aiyangar* for 1st res-
pondent.

Suit by plaintiff to enforce Registration of a will alleged to have
been made by his late father. The 1st defendant contended that

*A. 83 of 1900.

10th January 1902.

the will was a forgery and that even if true, the testator had no disposing power to make a will. The District Judge dismissed the plaintiff's suit. The plaintiff preferred this appeal to the High Court.

The Court delivered the following

JUDGMENT :—On the preliminary objection we agree with the ruling of the Calcutta High Court, *Jantoo v. Raja Canto Doss* (I. L. R., 8 C. 515) which does not appear to have been brought to the notice of the learned Judges who heard *Pydal Nambiar v. Kannan Nambiar*, 12 M. L. J. R. 87 in this Court, that Rs. 10 is the right fee.

The Court fee payable on a memorandum of appeal (also plaint) in a matter arising under section 77 of the Registration Act III of 1877 to enforce registration is a fixed fee of Rs. 10 under Art. 17, cl. 12, Sch. IV of the Court Fees Act.

[The remaining portion of the judgment is omitted as immaterial for the purposes of this report.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Subba Naidu Appellant*
(Plaintiff.)

v.

Nagayya and others ... Respondents
(5th to 7th and 24th
defendants).

Hindu Law—Bhatta Vriith Inams—Personal Inams—Enfranchisement in favour of widow, effect of—Rights of Reversioners.

The enfranchisement of a personal inam unlike that of a service inam generally reserves the reversion to the Government in the absence of lineal descendants of the holder.

Where after the death of a Hindu widow in whose name a personal inam had been enfranchised, the person claiming under the collateral heirs of the husband who had no lineal descendants sued to recover the inam lands :—

Held that the plaintiff had no right to claim the same in preference to the reversionary right of Government.

Second appeal from the decree of the District Court of Cud-dapah in A. S. No. 7 of 1899 presented against the decree of the Court of the District Munsif of Nandalur in O. S. No. 442 of 1897.

* S. A. No. 604 of 1900.

10th October 1901.

Subba Naidu
v.
Nagayya.

Raghavacharlu was the last male owner. He died possessed of some Bhatta Vrithi Inams. His widow Sinamma succeeded him, and the lands were enfranchised in her favour. She gave long leases of the property to the defendants for no justifiable necessity and died. The plaintiff as vendee from the next heir of Sinamma's husband sued to recover possession from the defendants without reference to the leases which would expire in 1904. The District Munsif found that Bhatta Vrithi Inams were personal Inams but that by course of recent decisions (apparently referring to the decisions relating to service Inams) Sinamma must be treated as absolute owner. He therefore held that the leases were binding but that the plaintiff was entitled to possession after 1904 the expiry of the lease. On appeal by the plaintiff, the District Judge held that the decision in *Dharanipragada Durgamma v. Kadambari Virrazu*, I. L. R., 21 M. 47 applicable to a service inam must also be applied to personal inams and dismissed the appeal. The plaintiff preferred a second appeal to the High Court.

C. Ramachendra Row Sahab for appellant.

T. V. Seshagiri Iyer for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff sues to recover land in the possession of the defendants on the strength of his purchase from the reversioner of a Hindu widow in whose favour the land was enfranchised as a personal inam. The District Judge dismissed the suit on the authority of the case reported at *Dharanipragada Durgamma v. Kadambari Virrazu*, I. L. R., 21 M. 47 considering that the same principle would apply to a personal inam as to a service inam. We do not think, however, that the cases are parallel. When a service inam is enfranchised, the reversionary interest of Government is given up, but when a personal inam is enfranchised the reversionary right of Government is expressly reserved under the rules of the inam settlement. The plaintiff does not produce the inam title deed or show that the grant in this case was made on terms other than those sanctioned by the general rules—the reason, no doubt, being that there is no variation.

The plaintiff in fact comes into court without any title—his vendor the reversioner having none.

The second appeal therefore fails and it is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Subharaya Tawker ... Appellant*
(Plaintiff).

v.

Rajaram Tawker and others ... Respondents
(Defendants
23, 1 and 4 to 14.)

Hindu Law—Covenant in restraint of partition—Agreement to divide income—Subharaya Tawker v. Rajaram Tawker.
Right to demand partition.

Members of a family who have become divided in status by agreement of parties may sue for a partition by metes and bounds as ordinary tenants in common. A mere agreement to enjoy property by taking the income in certain shares does not amount to a covenant restraining partition. A member cannot ask for a share in family property when he has agreed to take a lump sum in lieu of such share.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 235 of 1898 presented against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 210 of 1897.

The plaintiff and defendants 1 to 8 were members of a joint Hindu family. By an agreement Exhibit A, dated 17th December 1884, they became divided in interest or status. The agreement provided that as regards certain lands in a village they were entitled to receive the net income in certain definite shares and as regards the house the plaintiff was entitled to a fixed sum of Rs. 500, in lieu of his share. Some of the lands were subsequently sold in court auction in execution of a decree against some of the members. Plaintiff brought this suit for partition and recovery of his share in the house and in the lands. The defendants set up that there was a will by Kashinath, the ancestor of these parties, by which he provided that no partition should be made of these properties. This, however, was held invalid by both the courts below as being a restraint on alienation. The defendants further contended that the existence of the agreement was a bar to plaintiff's suit on the ground that it impliedly prohibited partition.

Subharaya
Tawker
v.
Rajaram
Tawker.

The District Munsif held that the agreement, Exhibit A, operated as a prohibition against partition, and such a provision must be binding at least as between the parties to it; but that as in fact there was a court sale by which the sharers of some of the other parties in some of the lands passed to strangers, the bar placed by the agreement was removed. The District Judge held on appeal that the restraint upon partition was binding upon the parties, that the question of the effect of court sale must be considered when the auction-purchasers should bring a suit and that plaintiff was not entitled to a decree. Plaintiff preferred this 2nd appeal.

O. Sankaran Nair, P. S. Sivaswami Aiyar and M. R. Krishna Aiyar for appellant.

T. Balakrishna Bhat for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT :—We are unable to agree with the decision of the District Judge.

Under Exhibit A the members of the family became completely divided in interest in respect of all their property, but so far as the village now in question is concerned, it was agreed that the plaintiff was to receive one-fourth of the net income (on account of his one-fourth share of the village) from the eldest member of the family who was to manage the village.

Such an agreement cannot bar the plaintiff's right to sue for partition by metes and bounds of his one-fourth share of the village as one of the four tenants in common.

As regards the house, the plaintiff agreed to receive Rs. 500 in lieu of his share in the event of his refusing to live in the house. He is not entitled to a partition of it if the co-sharers are willing to pay him the Rs. 500.

We, therefore, set aside the decree of the lower appellate Court, and modify the decree of the District Munsif by directing that the plaintiff do recover one-fourth share of the house unless the co-sharers or any of them deposit in court for payment to the plaintiff Rs. 500 within three months from this date. In other respects we restore the decree of the District Munsif.

Plaintiff must have his costs in this and in the lower appellate Court.

Nataraja
Pillai

v.

Venkata-
chella Pillai.

The Court delivered the following

JUDGMENT :—From the terms of the gift (Exhibit I) it would appear that the properties were given to the daughter and her husband from mere love and affection. There is nothing there to indicate that the property given to the son-in-law was given in consideration of past service or that to the daughter for her maintenance, she being in an indigent state. Though these claims are now set up in support of the gift, they are not substantiated by any trustworthy evidence. The son-in-law not being an illegitimate son-in-law has, therefore, not the shadow of a right to the property, and the alienation to him must be held invalid. And so in the case of the daughter, as no authority is cited to us allowing the father of a married daughter to bestow undivided family property on her even for maintenance.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Moore.

Valambal and another	...	...	Petitioners*
			(<i>Pétitioner,</i>
v.			<i>Judgment-debtor</i>)
Logambal Ammal and another	...	..	Respondents.
			(<i>Assignee, Decree-</i>
			<i>holder, etc.</i>).

Valambal
v.
Logambal
Ammal.

Civil Procedure Code Section 255, para 2—Payment out of Court—Judgment-debtor's right to apply for certifying payment.

A judgment-debtor who has discharged the decree by payment out of Court may at once apply to the court to enter up satisfaction of the decree and is not bound to wait and see whether or not the decree-holder would himself certify satisfaction to the court.

Petition under section 622 of the Civil Procedure Code praying the High Court to revise the order of the Subordinate Judge's Court of Negapatam, dated 8th February 1901, in C. M. P. No. 185 of 1901 in S. C. S. No. 1699 of 1900.

One Rangasawmy obtained a decree on 23rd November 1900 against one Valambal for Rs. 300 and odd in S. C. S. 1699 of 1900 on the file of the Sub-Court, Negapatam (Small cause side). One Kaliappa obtained a decree against Rangasawmy and attached the decree against Valambal on 18th December 1900. Before this attachment, Rangasawmy, it was alleged, transferred his rights under the decree in S. C. S. 1699 of 1900 to Logambal who applied under section 258, C. P. C., for recording satisfaction on the ground of alleged payment to her by Valambal. The latter also applied under section 258, C. P. C. that the decree-holder might be called on to show cause why certificate of satisfaction should not be recorded. The Sub-Judge dismissed both petitions. He dismissed Valambal's application on the ground that her right to apply only accrued on default by the decree-holder, that there was no such default and that, therefore, her application was uncalled for.

A petition was put in on behalf of Valambal under section 622, C. P. C., on the ground that the Sub-Judge was wrong in thus declining jurisdiction.

C. Sankaran Nair for petitioner.

V. Krishnaswamy Aiyar for respondent.

The Court delivered the following

JUDGMENT:—It is impossible to uphold the order of the Subordinate Judge in so far as Valambal is concerned. There is nothing in section 258 of the Civil Procedure Code to warrant the conclusion arrived at by the Subordinate Judge that it is only when the decree-holder fails to certify under section 258 that the judgment-debtor can apply under paragraph 2 of that section. That paragraph gives her full liberty to apply as soon as she has paid the money and when she does so the Court is bound to enquire into the matter after issue of notice to the decree-holder and also, of course, to the assignee of the decree if it is alleged that there has been any assignment. The Subordinate Judge is directed to do so now and to dispose of Valambal's application on the merits of the case. This petition is allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*, and Mr. Justice Moore.

Pathambi Appellant*
(Plaintiff).

v.

Mytheen Bibi and another Respondents
(Defendants).

Pathambi
v.
Mytheen
Bibi.

Civil Procedure Code, Ss. 206, 244, 263 and 264—Amendment of decree after satisfaction—Nullity—Decree for possession satisfied—Subsequent dispossession—Fresh cause of action.

An amendment of the decree after satisfaction entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction.

Where in a suit for partition a decree for joint possession was first passed, but it was subsequently amended into one for actual partition after joint possession was given to the decree-holder and satisfaction entered:—

Held that the amended decree was a nullity, and that a subsequent ouster from joint possession gives a fresh cause of action for which a fresh suit might be brought.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 99 of 1899 presented against the decree of the Court of the District Munsif of Erode in O. S. No. 429 of 1898.

The plaintiff (appellant) first brought a suit against the defendants for partition and separate possession of her share in the plaint properties. She did not obtain a decree for partition but only for possession of her share. She obtained joint possession in pursuance of such decree. She subsequently applied for amendment, and the decree was amended into one for partition. She was subsequently dispossessed and brought this suit for possession without executing the amended decree for partition. The Courts below held that her suit would not lie and that her only remedy was to execute the amended decree. The plaintiff preferred a second appeal to the High Court.

K. P. Madhava Rao for appellant.

C. Mahadeva Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT :—The Judgment of the lower appellate Court dismissing the suit is based on the view that when the present suit was instituted, the decree in the former suit remained unexecuted and that the plaintiff might have applied for execution of that decree.

Patbanbi
v.
Mytheen
Bibi.

It seems to us that the decree in the former suit had been executed at the time the present suit was instituted. Under the original decree the plaintiff entered into joint possession and satisfaction of the decree was entered up. She then applied for and obtained an amendment of the decree, without taking steps to have the order recording satisfaction of the decree set aside.

The amendment of a decree the satisfaction of which had been recorded was a nullity. The state of things, therefore, is that in satisfaction of her decree the plaintiff entered into joint possession. She alleges she has been ousted from her joint possession.

The fact that she has been ousted from joint possession (if she has been so ousted) gives her a fresh cause of action in respect of which a fresh suit is maintainable.

We must set aside the decrees of the two lower Courts. The case must be restored to the District Munsif's file in order that he may dispose of it according to law. Costs will follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Alayakkammal

Appellant*
(Petitioner).

v.
a Chetty and another

Respondents
(Counter-petitioners).

Code, Ss. 291 and 311—Sale in Court precincts, adjournment of, with order—Irregularity—Res-judicata in execution proceedings.

Alayak-
kammal
v.
Arunachala
Chetty.

Order in execution proceedings passed after notice to the judgment-debtor and determining the rate of interest payable on the decretal amount is questioned by the judgment-debtor in subsequent proceedings. A sale of property in, or in the precincts of, the court-house cannot be adjourned without the leave of the court under S. 291, C. P. C., and a sale so held

Alayak-
kammal
v.
Arunachala
Chetty.

after such adjournment must be set aside as irregular under section 311, C. P. C., when in consequence of such irregularity the property has been sold for an undervalue.

Appeal from the order of the District Court of Salem, dated 28th July 1900, passed on C. M. P. No. 718 of 1897 in execution petition No. 34 of 1897 (O. S. No. 14 of 1896).

A decree was obtained against one Nanjia Goundan, petitioner's husband. In execution of this decree his properties were proclaimed for sale on 18th October 1897. The sale began on that date and was continued till the 22nd when it was stopped. There was apparently no order of the court staying the sale held by the court officer in court premises. The sale was resumed on the 29th October and was closed on the 30th, the 2nd counter-petitioner Kasturirunga Iyer becoming the purchaser. The petitioner applied to have the sale set aside on two grounds:—(1) that there was irregularity in the conduct of the sale by reason of this adjournment that intending bidders did not turn up owing to their not knowing the date of sale and that in consequence the property was sold for an undervalue, (2) that the decree-holder was wrong in calculating interest at 12 p. c. on the decretal amount and that if interest should be calculated at 6 p. c. and if several payments omitted by the decree-holder should be taken into account, there would be no amount due under the decree. The 1st counter-petitioner, the decree-holder's assignee, denied the irregularity and the payments and stated that the petitioner was concluded by a previous order in execution allowing interest at 12 p. c. The District Judge dismissed the petitioner's petition holding the contentions of the decree-holder. The petitioner preferred this appeal to the High Court under S. 588, C. P. C.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* respondent.
laint.

P. S. Sivaswamy Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The first matter pressed is as regards the rate of interest. We agree with the District Judge that Mr. Horsfall's order on execution petition No. 24 of 1893 is binding on the appellant as he was a party to the proceedings and did not appeal against the order.

We are, however, satisfied that the sale was adjourned from the 22nd to the 29th October 1897 without any order from the judge, there being no such order on the record. Such order is required by section 291, Civil Procedure Code, as the sale was within the precincts of the court-house. The evidence also shows that the property was sold for far less than its value, and it is a fair inference that this was due to the irregularity in adjourning the sale.

We must, therefore, allow the appeal with costs and set aside the sale and direct that the property be again put up for sale after a fresh proclamation.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Fischer	Appellant*
	(1st Defendant).
v.	
Bapu and another	Respondents
	(Plaintiffs).

Local inspection by Judge—Facts observed by Judge—Notes of Inspection—No Evidence—Judgment based on such facts and notes—Illegal.

Fischer
v.
Bapu.

A judgment based on facts observed by the judge on making a local inspection and on notes of inspection made by him at the time is illegal and must be set aside as being based on no legal evidence.

Second appeal from the decree of the District Court of Madura in A. S. No. 93 of 1899, presented against the decree of the Subordinate Judge's Court of Madura (West) in O. S. No. 60 of 1897.

The question in dispute in this case was as to the source of irrigation to certain nanja lands of plaintiffs. Their contention was that by custom they were entitled to irrigate their lands from a channel called Karisalkulam by damming it at certain points. The defendants disputed this right. The Sub-Judge who tried the case after recording evidence made a local inspection and made certain

* S. A. No. 774 of 1900.

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notes, which he filed as an exhibit in the case. He found in favour of plaintiffs' right to dam the channel only at some of the points mentioned by them and further dismissed the plaintiffs' claim for damages. The plaintiffs appealed to the District Judge. The latter made a fresh inspection and made his own notes. He ultimately gave a decree for the plaintiffs finding that they had a right to dam the channel at all the points mentioned by the plaintiffs and also awarded the plaintiffs some damages. The 1st defendant preferred this 2nd appeal.

C. Sankaran Nair and *T. Rangachariar* for appellant.

P. S. Sivaswamy Aiyar and *T. R. Venkatarama Sastri* for respondents.

The Court delivered the following

JUDGMENT:—We find that both the Subordinate Judge and the District Judge on appeal, have founded their judgments, to a very great extent, on facts observed by them when making a local inspection of certain places and on impressions conveyed to their minds by what they observed on such inspections. These notes, which are in considerable detail are, set out in pages 21 to 25 of the printed papers. We must hold that the course thus adopted by the judges was most irregular and that the judgments now before us are in certain material points based on what was in no sense legal evidence. We have no option, therefore, but to set aside the decisions of both the lower Courts and remand the suit to the Subordinate Judge of Madura (West) for re-trial on the evidence already on record and such additional evidence as he may consider it advisable to allow either party to adduce. The notes of inspection of the judges already alluded to must be expunged from the record, and the Subordinate Judge in re-trying the case must not take into consideration either the judgment of his predecessor or his own previous finding on an issue referred to him by the appellate Court or the judgment of the appellate Court.

Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Ittappan Kuthiravattath Nair . . . Appellant *
(Plaintiff).

v.

Nanu Sastri and others . . . Respondents
(Defts. and leg.
reptves. of 3rd deft).

Redemption Suit—Onus of proof—Subsisting title—Limitation Act XV of 1877, section 19—Acknowledgment of liability—Evidence aliunde.

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In a suit for redemption the onus is on plaintiff to show not only that there is a mortgage but also that he has a subsisting title to redeem. He must prove the date of the mortgage affirmatively when a question arises whether his right to redeem is barred and the date is material.

An acknowledgment to be valid under section 19, Limitation Act, must amount to an acknowledgment of liability to plaintiff. It must appear, on the face of the acknowledgment, that there was an existing liability, and such liability cannot be read into it by proof *aliunde* though the nature of the right or liability referred to in the acknowledgment may be proved by evidence *dehors* the written acknowledgment.

A mere declaration by the mortgagee that the mortgagor is the owner will not be a sufficient acknowledgment of the mortgagor's title unless the mortgagee further acknowledges that he is in possession (or holds under the mortgagor).

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in A. S. No. 813 of 1899 confirming the decree of the Court of the District Munsif of Palghat in O. S. No. 337 of 1898.

Plaintiff sued to redeem a *kanom* granted in Malayalam Era 1001 (1825-6). The first defendant denied the plaintiff's claim in *toto*, and pleaded that the suit was barred by limitation. The plaintiff relied upon Exhibit G as an acknowledgment by defendant of plaintiff's title which saved the bar if any. Both the courts below dismissed the plaintiff's suit as barred. Plaintiff preferred this second appeal. The following is the material portion of Ex. G. (15-1-1859) relied upon as an acknowledgment. "Writing by Suppu (defendant's ancestor) for the information of Ozhukil Komu Menon. As I am given a renewed *thiruvezhuthu* deed, dated

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3rd Makaram 1034 signed and sealed by His Highness the Zamorin whereby the following properties, which are included in these properties of Kuthiravattath Nair (Plaintiff) one-half of which belongs to the Zamorin's Kovilagam, situated in Desom ...consisting of land sowing 15½ paras of seed, being a moiety of lands sowing 31 paras of seed, have been demised to me." The present suit, was for the redemption of the Kuthiravattath Nair's (plaintiff's) moiety of the above 31 paras of land described in Exhibit G.

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar* for appellant.

P. S. Sivaswamy Aiyar and *C. V. Anantakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—In a suit for redemption the *onus* is on the plaintiff not only to prove that the defendant's ancestor obtained the lands on mortgage from the plaintiff's ancestor but also that he has a subsisting title. In Exhibit A, the counter-part executed by the 1st and 2nd defendants' ancestor the year alone appears but the portion in which presumably the month and date were inserted has been destroyed by age, and no secondary evidence has been adduced to prove that the date of the document was some day in Malayalam year 1001 (which alone is now visible) prior to 28th July in which case alone the suit would be within time irrespective of the acknowledgment relied upon in Exhibit G. There is no proof that the mortgage deed was executed and delivered by plaintiff's ancestor to 1st and 2nd defendants' ancestor and that the defendants being in possession thereof, withhold its production. Even if it were proved it cannot be presumed simply from that circumstance that its date was some day prior to 28th July in 1001, especially, in a case like the present in which the defendant does not admit the mortgage sued upon but pleads that he was never a mortgagee but had all along been the proprietor. If, as contended on behalf of the appellant, there is in Exhibit G dated 15th January 1859, under which the 1st and 2nd defendants' ancestor obtained a grant from the Zamorin of a moiety of the lands described in the schedule to the plaint, an acknowledgment of liability within the meaning of S. 19 of the Indian Limitation Act in respect of the

other moiety which is the subject of this suit, the suit will be saved from the operation of the law of limitation. Even assuming that the Courts below rightly construed Exhibit G in holding that therein the 1st and 2nd defendants' ancestor referred to the plaintiff's ancestor as the owner of the date of the document of the moiety of the lands now in question, it is impossible to hold, in the absence of any statement in Exhibit G, that its executant was then in possession of such moiety, that there is in Exhibit G any acknowledgment of liability in respect of plaintiff's ancestor to such moiety.

Though under section 19 the exact nature of the right or liability need not be disclosed by the acknowledgment (*Quincey v. Sharpe*, 1 Exch. Div., p. 72) and its exact nature may be established by evidence *dehors* the written acknowledgment yet the acknowledgment in itself should import that the person making the acknowledgment is then under an existing liability (*vide* judgment in Appeal No. 166 of 1899) and such liability cannot be read into it by proof *aliunde* or by the plaintiff's present admission that as a matter of fact, the executant was then in possession of the moiety in question which in Exhibit G is referred to as belonging to plaintiff's ancestor.

The second appeal therefore fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Gangi and another Appellants*
(Plaintiffs).

v.
Ramaswami Respondent
(1st Defendant).

Civil Procedure Code, Secs. 26, 28 43 and 50—Cause of action—Ground of title common—Plaintiff's right infringed by different defendants—Omission to include all.

Cause of action in section 43, C. P. C., has reference entirely to the grounds set forth in the plaint and has no relation whatever to the defence. It is not something independent of the defendant, but has reference to the defendant against whom relief is claimed.

Cooke v. Gill, L. R. 8 C. P. 107 *Sankar v. Day Sankar*, L. R. 15 I. A. 66 and *Chund Kour v. Pentab Singh*, L. R. 15 L. A. 156 referred to

A cause of action against one person is not a part of the cause of action against another if it is not a joint one against both. Section 43 has no ap-

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plication to a case where though the ground of title is one and the same in both suits and the cause of action arises at the same time, the persons infringing the plaintiff's right are different and there was no manner of combination or privity between the said persons.

Though under S. 28 C. P. C. several defendants are permitted to be joined if the reliefs claimed arise in respect of the same matter though not in respect of the same or a single cause of action, the plaintiff is not bound so to join and S. 43 does not bar the institution of several suits against such several defendants in respect of causes of action, which are not single but different.

A plaintiff may at his option bring one suit against several defendants to set aside all alienations made by a widow in their favour when he has the same ground of title or he may bring different suits against each defendant. The mere fact that he has the option to bring one suit against all does not make his omission to include one defendant (alienee) in a prior suit a bar under Sec. 43, C. P. C., to his subsequent suit against another not made party in the 1st suit.

Jehan Beeber v. Savuk Ram, 1 Agra High Court Part III p. 109, *Rao Kurrun Singh v. Fyz Ali Khan* 14 M. I. A. 187 and *Mothoor Mohun v. Kheminkurce*, 5 W.R. (C.R.) 182 followed.

Second appeal from the decree of the District Court of Godavari in A. S. No. 344 of 1899, presented against the decree of the Court of the District Munsif of Tanuku in O. S. No. 795 of 1896.

V. C. Seshachariar for appellants.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* and *E. Venkatarama Sarma* for respondent.

The Court delivered the following

JUDGMENT:—*Bhashyam Aiyangar, J.*:—The point arising in this second appeal is whether the appellants (plaintiffs) are precluded by section 43 of the Civil Procedure Code from bringing this suit by reason of their having omitted to include the present claim in their former suit O. S. No. 490 of 1887, assuming, as is apparently found by both the lower Courts, that at the institution of the former suit they were aware that the land now sued for was in the possession of the present defendant and that the same formed part of their father's estate. The first suit was brought by these plaintiffs for the recovery of some other land which was in the possession of the defendant in that suit and the same was awarded to them by the decree of the appellate Court therein, which was confirmed by the High Court in second appeal on the 13th August 1890 (Exhibit E).

The present suit was brought in 1896 for the recovery from defendant herein, of the land mentioned in Schedule A to the plaintiff which is different from the land mentioned in Schedule B, the subject-matter of the former suit. The plaintiffs' ground of title in both the suits is one and the same, *i. e.*, that as the heirs of their father they were entitled to succeed to both the properties on the death of their mother on the 9th January 1887. The former suit was instituted against the defendant therein, by reason of his wrongfully withholding from the plaintiffs, on the death of their mother, possession of the land in Schedule B, and the present suit is brought on the defendants herein similarly withholding the land comprised in Schedule A, the defendants in both the cases having respectively come into possession of the lands comprised in Schedules B and A under separate alienations made by the mother in favour of each on a different occasion. It will thus be seen that though the ground of title is one and the same in both the suits and the cause of action in respect of both arose at the same time, *viz.*, the date of the mother's death, yet the persons who wrongfully withheld the land in Schedule A are quite different and there was no manner of combination or privity between them in respect of the lands which they severally withheld.

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The words 'cause of action' have all along been held to mean 'every fact which it is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse,' and have no relation whatever to the defence, but refer entirely to the grounds set forth in the plaint as the cause of action (*Cooke v. Gill*, L. R. 8 C. P. 107; *Sankar v. Day Sankar*, L. R. 15 I. A. 66; *Chand Kour v. Pertab Singh*, L. R. 15 I. A. 156).

Though the ground of title on which both suits are founded is one and the same and the causes of action also arose at the same time, yet the properties comprised in the two suits are different and the persons who severally withheld the same are also different. A reference to section 50, Civil Procedure Code, clearly shows that in every suit the plaint must show that the defendant is or claims to be interested in the subject-matter and that he is liable to be called upon to answer the plaintiff's demand. This clearly shows that the cause of action is not an abstraction, something independent of the defendant, but that the plaint should disclose a cause of

Gangi v. Ramaswami. — Bhaskyam Aiyangar, J. action against the defendant. And section 43 only provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that if a plaintiff omit to sue in respect of any portion of his claim arising from the cause of action for the enforcement of which the suit is brought, he shall not afterwards sue in respect of the portion so omitted. In the former suit the plaintiffs were entitled to call upon the defendant therein only to answer the demand in respect of the land comprised in Schedule B in which alone that defendant was and claimed to be interested. If the land in Schedule A had also been withheld by him from the plaintiffs, plaintiffs' claim to the same would be only a part of the claim which they were entitled to make against that defendant and section 43, Civil Procedure Code, would be a bar to the present suit if he were the defendant herein or the defendant herein were a person claiming under him. In respect of the land in Schedule B the plaintiffs' cause of action was only against the defendant in the former suit, and in respect of the land in Schedule A their cause of action is only against the defendant herein, and in my opinion, it is impossible to hold that the former suit did not include the whole of the claim which the plaintiffs were entitled to make in respect of the cause of action on which that suit was founded, and that the claim in the present case is a part of the claim which they were bound to make in the former suit: in other words, that a cause of action against one person is a part of the cause of action against another though it is not a joint one against both.

In *Pittapur Raja v. Suriya Rau* (I. L. R., 8 M. 520) in which section 7 of Act VIII of 1859 (corresponding to section 43 of Act XIV of 1882) was pleaded as a bar to a subsequent suit between the same parties, their Lordships of the Privy Council explained the law as follows (at page 524):—"That section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought. The claim in respect of the personality was not a claim arising out of the cause of action, which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of Voeravaram.

It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. 'There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action.' (See also *Moonshee Buzloor Ruheem v. Shumsoonnissa Begun* and *Jodonath v. Shumsoonnissa Begam*, 11 M. I. A. at p. 605). In the 8 Madras case, the parties were the same in both the suits but the subject-matter different. Neither will section 43, Civil Procedure Code, be a bar to a suit against one of two or more joint and *several* obligors, though for the same debt a suit had been already brought and decree obtained against another of such obligors (per *Baron Bayley* in *Lechmere v. Fletcher*—1 C. and M. 623 at p. 635; *Dhnaput Singh v. Sham Sunder Mitter*, I. L. R., 5 C. 291). In such a case the defendants are different in the two suits but the subject-matter is the same. The present case is stronger than either of the above classes of cases, the defendants as well as the subject-matters being different in the two suits. The wrongful withholding of Blackacre by X and the wrongful withholding of Whiteacre by Y, cannot constitute the same causes of action, by reason only of the plaintiff's ground of title both to Blackacre and Whiteacre being the same, when he sues X and Y separately in respect of Blackacre and Whiteacre respectively, alleging the same ground of title, but distinct wrongful withholding by each of them. I may also here refer to more than one decision of this Court in which it was held that a suit for a mere declaration of right to any property under section 42 of the Specific Relief Act is not obnoxious to the proviso thereto, by reason of the plaintiff being able to seek further relief in respect of such property against a person other than the defendant in the suit. *Subramanyan v. Parameswaran*, (I. L. R., 11 M. at p. 122; *Chinnammal v. Varadarajulu*, I. L. R., 15 M. at p. 310.)

The very question arising in this case was considered by a Full Bench of the N. W. P. High Court, in 1867 in *Jehan Bebee v. Saivukh Ram* (Agra High Court Reports, Full Bench, Vol. I, Part III, p. 109) and it was there held that it was not obligatory on the heirs to make all the alienees parties to the first suit, upon pain of forfeiting all future right of suit against them by reason of

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such omission. The reasoning on which the decision proceeded is as follows :—“ As against the widow the cause of action is based upon the fact that she has made an alienation of the inheritance in excess of her interest. As regards an alienee, the cause of action arises from the circumstance, that the possession of a part of the inheritance is wrongfully withheld. Although the alienation may have been wrongful, it does not follow that an heir is entitled to recover possession from the alienee. Such an alienee, if a purchaser or mortgagee, may, under the doctrines laid down in *Hanooman Persaud Pandey v. Munraj Koonwaree* (8 M. I. A. at p. 393) successfully defend his possession by proving that he acted honestly and with due caution, but was himself deceived—and yet the heir might, although he could not succeed in a suit against the alienee, recover damages from the widow for her wrongful act. For the same reason (*i. e.*, that the cause of action against the alienee is the wrongful withholding of possession), the heir's cause of action as against different alienees who have acquired possession under alienations made at different times and under different circumstances, is not one and the same cause of action, as is admitted by the respondent's pleaders. To apply these conclusions to the case before us—the plaintiffs sued on the same title in the former and in the present suit and the question as to the widow's right to alienate arose equally in each case. But the sales were distinct, different lands having been sold at different times to different purchasers.”

A different view was taken in an earlier decision of a Full Bench of the Sadr Dewany Adalat of N. W. P. (*Fyz Ali Khan's* case, 20th March 1866) which, however, was distinguished in the above case (*Spankie, J.*, dissenting). In *Fyz Ali Khan's* case, the reversionary heir, Rao Kurrin Singh, sued to establish his title to 27 villages which had formed the estate of Dhuleep Singh who died in 1846 and was succeeded by his widow and mother successively. The widow died in 1856. Rao Kurrin Singh's grandfather was the heir-at-law, but he was a lunatic and Rao Kurrin Singh, on his own account and as guardian of his lunatic grandfather, sued to establish his title to the property which had been alienated by the widow with the concurrence of the mother of Dhuleep Singh, joining the mother as a party to the suit along with the alienees. She died during the pendency of the suit and Rao

Kurrun Singh succeeded and obtained proprietary possession of the 27 villages, though not actual possession of 3 of them which were in the possession of mortgagees who had not been made parties to the suit. The mortgages had been made by the widow, with the concurrence of the mother, prior to the permanent alienations which were set aside by the decree in the suit as not binding upon the reversionary heir. Subsequently, Rao Kurrun Singh sued the mortgagees to avoid the mortgages as unlawful and recover full possession of the three villages in their possession. The second suit was dismissed by a Full Bench on the ground that Rao Kurrun Singh's cause of action was Dhuleep Singh's widow's death and he had to establish his title to his property the whole of which had been alienated by the widow and the mother and as he did not include the mortgagees in the first suit, though he did sue and obtain proprietary possession of the estate, he could not subsequently sue to avoid the mortgages as unlawful. Appeals were preferred to Her Majesty in Council from the decision of Sadr Dewany Adalat in the first suit and from the Full Bench decision in the second suit (*Koer Golab Singh v. Rao Kurrun Singh*, 14 M. I. A., p. 176; *Rao Kurrun Singh v. Fyz Ali Khan*, 14 M. I. A., p. 187). Both the appeals are dealt with in one common judgment, the result being that the appeal from the first suit was dismissed, but the appeal from the second suit was allowed and the Full Bench decision of the Sadr Dewany Adalat reversed on the ground that the second suit was based on a different cause of action from the first and that section 7 of Act VIII of 1859 was therefore no bar to the subsequent suit. It will be seen that out of the 27 villages which formed the subject-matter of the first suit and had been alienated to the defendant therein, for a purpose not binding upon Rao Kurrun Singh, the next reversionary heir, 3 villages had already been mortgaged to, and were in the possession of, the defendant in the subsequent suit, the purpose for which the property was thus mortgaged being also found not to be one that would be binding upon the reversionary heir. The three villages were included in the first suit and also formed the subject-matter of the second suit, the equity of redemption thereof being alone comprised in the former suit, and the mortgage estate which has been carved out of the said three villages constituting the subject-matter of the second suit and defendants also being different in the two suits. The

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ground of title on which the two suits were founded was one and the same as in the present case and the cause of action in each also arose at the same time and in one sense, so far as the three villages in question were concerned, the two suits related to different interests in the same property. Their Lordships of the Judicial Committee, in reversing the decision of the Full Bench, laid down that the true test of the proper application of the section in question as a bar to a subsequent suit in any particular case must be whether there has been a splitting of the cause of action, that upon the above facts the two suits cannot be regarded as having been based upon the same cause of action and the second suit cannot therefore be said to have been brought upon a splitting of the cause of action. In *Mothoor Mohun v. Khemunkuree* (5 Suth. W. R., p. 182) the same view was taken by the High Court of Calcutta and the operation of section 7 of Act VIII of 1859 explained as follows:—

“Section 7 of Act VIII of 1859 requires that, if all rights arising out of the *same cause of action* are not sued for together, the portion abandoned cannot be separately sued for afterwards, but does not enact similar penalty for all rights under the *same* or similar titles, the right to sue for which may arise under *different* dates and *causes of action*, and the defendants as to which different properties may be either only one party or different parties altogether.”

These are direct authorities in favour of the appellants' contention. The respondent's pleader chiefly relies upon the unreported decision of this Court in Appeal No. 182 of 1896, where in a case which was substantially the same as the present, it was held by a Division Bench that section 48, Civil Procedure Code, was a bar, the only difference between that case and the present being that in the former the plaintiff in the second suit was not the reversionary heir himself, but a person claiming under him under an alienation made subsequent to the first suit. This, however, is only a circumstantial difference and it must be admitted that that decision fully supports him. But the above decision of the Privy Council does not appear to have been brought to the notice of the learned Judges who decided that case and their decision cannot be reconciled with that of the Privy Council. The respondent's.

pleader is not able to cite any other case in which under similar circumstances section 43, Civil Procedure Code, was held to be a bar. Gangi
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The decision in Appeal No. 182 of 1896 purports to be based upon a course of decisions in this Presidency in which it was held that a suit relating to various properties in the possession of different defendants who claimed under different alienations made by a widow or by a Karnavan or the managing member of a 'Tarwad' of a joint Hindu family, is not open to the objection of misjoinder of defendants and of causes of action, when the plaintiff's ground of title to all the properties included in the suit is the same. (*Vasudera Shanbhaga v. Kuleadi Narnapai*, 7 M. H. C. R. 290; *Alahomed v. Krishnan*, I. L. R., 11 M. 106; *Abdul v. Aayaga*, 12 M. 234; *Byathamma v. Avulla*, I. L. R., 15 M. 19). With all deference, I venture to state that the course of decisions referred to does not warrant the inference drawn therefrom that the plaintiff is bound to include all the properties alienated and the alienees in one and the same suit, and that if he omits to do so, his subsequent suits are obnoxious to section 43, Civil Procedure Code. A person suing for partition of an estate or for an estate which has devolved upon him by inheritance may so shape his plaint as to base it upon a single cause of action, the various defendants being joined as parties in possession of the estate. Further, under section 28, Civil Procedure Code, relating to the joinder of different persons of *defendants*, it is open to a plaintiff to join as defendants various persons against whom the right to relief is alleged to exist, whether jointly, *severally* or in the alternative in respect of the *same matter*. And judgment may be given against such one or more defendants as may be found to be liable, according to their respective liabilities. It would be noted that the phrase 'in respect of the *same matter*' occurring in this section, is wider than the phrase 'in respect of the *same cause of action*' occurring in section 26, Civil Procedure Code, relating to the joinder of different persons as *plaintiffs* in the *same* suit (*Raghunath v. Sarosh*, I. L. R., 23 B. 266). I need hardly add that the expression in section 43, Civil Procedure Code, is 'cause of action' and not 'matter'. In *Ishan Chunder v. Remeswar* (I. L. R., 24 C. 831), it was held, following the decision of this in 6 M. H. C. R. and 11 Madras series above referred to, that "In

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a suit for ejectment against several defendants who set up different titles to various parts of the land claimed, there was only one cause of action" and it was observed that 'in England in an action in ejectment all the parties in possession are joined'. Under the English law, the persons to be made defendants in an action in ejectment, i. e., to be named in the writ, are all the persons in possession of the land sought to be recovered; and the persons who have a right to defend an action of ejectment are not only the persons named in the writ, but also any person who is in possession by himself or his tenant (Rules 112 and 113; pp. 424—98, Dicey's 'Parties to an action', edition of 1870). As to cases in which different persons are in possession of different portions of the property, the rule laid down in Cole on 'Ejectment' (page 76) is as follows:—When the tenements claimed and the tenants therefore are numerous, it is frequently advisable to bring two or more distinct ejectments rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble. Under the English law and practice in an action of ejectment, the plaintiff need include in the action only those who are in possession of the land and for the recovery of which the action is brought and in cases in which the plaintiff as heir-at-law may have to recover different portions of the inheritance which are in the possession of different persons, he must exercise a sound discretion and judgment as to whether it would be expedient to bring one action of ejectment against all the defendants or different actions in ejectment against different persons in respect of the tenements in their respective possession.

Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit, which may be set up by the different defendants. Even if the plaint is not based upon one and the same cause of action, yet if the relief that is claimed severally against the different defendants be in respect of the *same matter*, section 28, Civil Procedure Code, will save it from the objection of multifariousness.

For the above reasons and following the Full Bench decision of the N. W. P. High Court in *Jehan Bebee v. Saivuk Ram* and the

decision of the Privy Council in *Rao Kurran Singh v. Fyz Ali Khan*, I would allow this second appeal and reversing the decree of the lower appellate Court, remand the appeal for disposal on the merits. Costs of this second appeal will be costs in the cause.

Moore, J.:—I concur.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, and
Mr. Justice Benson.

Venkatasubramany Iyer ... Appellant*
(Plaintiff).

v.

Koran Kunnan Ammad and others ... Respondents
(Defendants).

Civil Procedure Code, S. 257-A.—Decree—Execution of a mortgage bond for judgment-debt—Decree kept alive—Mortgage void.

Venkata-
subramany
Iyer

Where for the discharge of a judgment-debt, the debtor executed a mortgage bond to the decree-holder promising payment of the amount by instalments but the decree was still kept alive for the benefit of the creditor in case the debtor should make default in paying the debt:—

v.
Koran
Kunnan
Ammad.

Held that the mortgage was a contract to give time for the payment of the judgment-debt within the meaning of S. 257-A of the Code of Civil Procedure and that it was void for want of sanction by the Court

Seemle that if the decree had been surrendered as satisfied in consideration of the execution of the mortgage bond, the judgment-debt would have ceased to exist and the mortgage would not be within the prohibition of S. 257-A.

Tukaram v. Anantbhat, I. L. R., 25 B. 252 followed, *Jugi Kamti v. Annai Bhatta*, I. L. R. 17 M. 332 and *Hukum Chand Oswal v. Taharunnessa Bibi*, I. L. R. 16 C. 504 dissented from.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 26 of 1900, presented against the decree of the Court of the District Munsif of Vayithiri in O. S. No. 56 of 1899.

The necessary facts appear in the judgment. The material terms of the document, the construction of which is discussed in the judgment, are these:—"Karar executed by * * to * * on the 14th March 1887. Rs. 7,500 having been found to be due to you after deducting the payment made to-day out of the total amount found this day to be payable to you by three of us jointly, being the decree amount and

* S. A. No. 910 of 1900.

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court costs with interest under the decrees passed against us the 1st and 2nd defendants in O.S. No. 16 of 1885, it has been agreed that this sum of Rs. 7,500 without interest, should be paid up by 15 instalments of Rs. 500 each from the year 1887-8, each instalment being payable annually on the 13th March and that receipts should be obtained registered at our cost. Our properties, moveable and immoveable, given in the following schedule * * are hypothecated in respect of this. In default of this, it has been agreed that you do recover it by duly executing the decree of the court against our person or our properties * * * *. When this debt shall have been liquidated, this document with the pledged documents will be received back and the decree will have to be cancelled then. This debt will be liquidated by one or all of us."

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for appellants.

K. R. Subrahmaniam Sastri for 1st and 2nd respondents.

The Court delivered the following

JUDGMENTS :—*Chief Justice* :—As regards the question of the construction of the bond (Exhibit A), the District Munsif held that the only remedy open to the plaintiff on default by the defendants was to apply for the execution of the decree mentioned in the bond. The District Judge apparently took the same view. It seems to me clear that, on the true construction of the bond, the document purports to give a two-fold remedy to the plaintiff on failure by the defendants to pay the instalments mentioned in the bond, *first*, a right to sue for the balance of Rs. 7,500, *secondly*, a right to recover the balance by executing the decree. This appears to be the true construction of the document whether the words "in default of this" are read as meaning in default of payment of the instalments or in default of payments of the lump sum. There is an express agreement to pay the lump sum on failure to pay the instalments and an express agreement that the decree shall be kept alive and the rights of the plaintiff in execution of the decree preserved.

It has been contended on behalf of the defendants that inasmuch as under the terms of the bond the relation of judgment-creditor and judgment-debtor still subsists the bond is an agreement

to give time for the satisfaction of a judgment-debt, and the sanction of the court not having been obtained, section 257-A of the Code of Civil Procedure renders the agreement void.

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Section 257-A might, no doubt, be construed as having the effect of rendering the agreement void only in so far as it purported to give time so that, notwithstanding the agreement, the judgment-debtor would not be entitled to set up the agreement as a bar to the judgment-creditor's rights in execution, whilst the judgment-creditor, on the other hand, would be entitled to enforce an independent contract to pay the judgment-debt which was supported by consideration. But it seems to me that so to construe the section would be to defeat the object of the legislature, *viz.*, the protection of judgment-debtors. I assume in the present case that the contract to pay is supported by a real consideration. Still it is a contract to pay the amount of the judgment-debt with a stipulation that it shall not be payable at the time when, under the decree, it became payable. The relation of judgment-creditor and judgment-debtor still exists by the express agreement of the parties. The debt is still enforceable as a judgment-debt. This being so, I feel it impossible to construe the bond in question otherwise than as an agreement to give time for the satisfaction of a judgment debt. The sanction of the court not having been obtained, I think the bond is invalid. If, as in *Tukaram v. Anantbhat*, I. L. R., 25 B. 252, the effect of the mortgage bond had been to extinguish the rights of the judgment-creditor under the decree and to substitute therefor the rights given him by the mortgage bond, the agreement clearly would not be an agreement to give time for the satisfaction of a judgment-debt because, the effect of the agreement would be to put an end to the judgment-debt. In the present case, there is an express agreement to preserve the judgment-creditor's rights in execution and thus keep the judgment-debt alive. With all respect to the learned judges who decided the case reported in *Juji Kamti v. Annai Bhatta*, I. L. R., 17 M. 382, although I think it was rightly held in that case that the contract to pay by instalments was not void, I confess I cannot follow the reasoning on which the conclusion appears to be based. The judges observe that the scheme of the Code of Civil Procedure suggests that the intention of section 257-A, was to render an agreement to pay the amount of the judgment-debt by instalments

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void only in so far as it affects the right to execute the decree. But in that case the consideration for the new promise to pay was the surrender by the judgment-creditor of his right in execution of the decree. The decree was extinguished by agreement between the parties, and being so, I fail to see how any question as to how the section affected the rights of the execution creditor in execution of the decree was material.

If a judgment-creditor is willing that his judgment-debt should be extinguished, and that his right as judgment-creditor should be given up and the judgment-debtor is willing to give and the judgment creditor to accept other rights in substitution, I do not see how an agreement which carries out this intention is contrary to public policy or to the express words of section 257-A. The parties are dealing at arms length, which would not be the case if the new contract was entered into upon the footing that the creditor's rights under the decree were to be kept alive and held *in terrorem* over the head of his debtor.

If a judgment-creditor wants to keep his judgment-debt alive and at the same time is willing to give time for the satisfaction thereof to the judgment-debtor, the law says that an agreement carrying out such intention shall be void unless sanctioned by the court. In *Hukum Chand Oswal v. Taharunnessa Bibi*, I. L. R., 16 C. 504, there was no agreement by the judgment-creditor to surrender his rights under his decree, and that being so, I cannot help thinking the case was wrongly decided. The judges there observe, "It seems to us that it is in the event of an application being made to enforce the agreement entered into between the parties under the bond in the course of the execution of the decree that an objection like that now raised (i. e., that the agreement was void under S. 257-A) could have been successfully made." This means that if the judgment-creditor applies to execute his decree and the judgment-debtor sets up the agreement to give time, the judgment-creditor can successfully object that the agreement is void under S. 257-A, while there is nothing to prevent him enforcing the fresh contract the effect of which is to give the judgment-debtor time for the satisfaction of the judgment-debt. This, as I have said, seems to me to defeat the object of the legislature.

I think the real test is that adopted by the Bombay High Court in the case reported in I. L. R., 25 B. 252. If the parties agree that the judgment-debt *qua* judgment-debt shall be put an end to, S. 257-A. does not render void the new contract. The new contract does not give time for the satisfaction of a judgment debt, since this judgment-debt no longer exists. If the judgment-debt is still alive, a new contract like that contained in the bond in the present case to pay the judgment-debt appears to me, although it may be supported by fresh consideration, to be an agreement to give time, for the satisfaction of the judgment-debt and therefore void under S. 257-A. I need only add that, in my opinion, the agreement in the present case is none the less void because a party, who appears to be the legal representative of one of the judgment-debtors, became a party to the mortgage bond, though he was not a party to the suit in which the decree was obtained.

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Chief Justice

I think the appeal should be dismissed and I think the respondents are entitled to their costs throughout.

Benson, J. :—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Sriramamoorthy Chetty and others

... Appellants*

(Plaintiff's
representatives.).

v.

Pandara Goundan and others

... Respondents

(2 to 10 Defts).

Appeal—Part heard appeal—Transfer by District Court to Sub-Court Ultra vires.

A District Judge has no jurisdiction to transfer a part-heard appeal before him to a Subordinate Judge's Court, and the judgment of such Subordinate Judge after such transfer must be set aside as illegal and ultra vires.

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Kumaranwami Reddiar vs. Subbaraya Reddiar I. L. R. 23 M., 314 followed.

* S. A. Nos. 441 and 442 of 1900.

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See also Venkataramana Bhatta v. Badrayan, XI M. L. J. R. 493.

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Second appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in A. S. No. 7 of 1897 presented against the decree of the Court of the District Munsif of Salem in O. S. No. 151 of 1895.

The suit was filed by the plaintiff for a declaration of his title to enjoy the forest and minor produce of certain hills and to restrain the defendants from interfering and obstructing plaintiff's right thereto, and from removing any produce. The District Munsif gave the plaintiff a decree. The defendants appealed to the District Court and objected for the first time that the suit must be taken as one for possession the treating the suit was such the District Munsif would have no jurisdiction. The District Judge tried this question and sent an issue to the District Munsif to ascertain the valuation. Findings were given by the Munsif and the case was again heard by the District Judge, who held that the suit was rightly valued and was properly within the jurisdiction of the District Munsif. He however sent the case to the District Munsif for finding upon the other issues. When this finding was returned the District Judge transferred the appeal to the Sub-Judge who was directed to try the appeal. The Sub-Judge reversed the decree of the District Munsif and dismissed plaintiff's suit. Plaintiff preferred this 2nd appeal.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for appellants.

P. S. Sivaswami Aiyar for 1st to 3rd respondents.

T. V. Seshagiri Aiyar, 5th and 6th respondents.

The Court delivered the following

JUDGMENT :—Under the ruling in *Kumaraswami Reddiar v. Subbaraya Reddiar*, I. L. R., 23 M. 314, the Subordinate Judge had no jurisdiction to hear this appeal. His decree is, therefore, set aside and the appeal restored to the file of the District Court for disposal according to law. Costs of this second appeal will be costs in the cause.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS:

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Seshamma Shettati and others ... Appellants*
(Plaintiffs).

v.

Chickaya Hegade and others ... Respondents
(Defendants).

*Limitation Act, Art. 139—Mortgagor and mortgagee—Tenant under mortgagee—Seshamma
Permanent rights of occupancy—No adverse possession as against mortgagor—Shettati
Determination of tenancy—Act IV of 1882, section 111.*

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A person who is let into possession as a mere tenant from year to year or for a term of years or as mortgagee cannot, during the continuance of such relation by any assertion of title higher than that of such tenant or mortgagee acquire such title by adverse possession, even though the assertion was made to the knowledge of the landlord or mortgagee.

A tenancy can only be determined in one of the ways mentioned in S. 111 of Act IV of 1882, and a landlord's title can only be extinguished at the end of the period mentioned in Art. 139 of the Limitation Act.

A permanent lease granted by the mortgagee can hold good only as against the latter and until redemption of the mortgage.

Second appeal from the decree of the District Court of S. Canara in A. S. No. 197 of 1899, confirming the decree of the Court of the District Munsif of Coondapoor in O. S. No. 200 of 1898.

C. Ramachandra Rao Sahib and K. P. Madhava Rao for appellants.

K. Narayana Rao for 2nd to 7th respondents.

The Court delivered the following

JUDGMENT:—The proprietor of the land in question mortgaged it with possession to one Devappa Kamti in 1832. The plaintiffs as the assignees of the equity of redemption discharged the mortgage debt and redeemed the mortgage in 1894. It is alleged in

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the plaint that the defendants have been holding the land as tenants from year to year under the usufructuary mortgagee, that the tenancy has been terminated by due notice to quit given by the plaintiffs and the suit is accordingly brought to eject them from the land. The defendants contend that the land was given to their assignors by the proprietor, apparently in conjunction with the mortgagee, on a permanent lease, that out of the total annual rent of Rs. 130-14-9 they have been paying Government assessment and the balance of Rs. 60 to the mortgagee, and that subsequent to the redemption of the mortgage by the plaintiffs, they remitted the said sum of Rs. 60 by postal money order to the plaintiffs who refused to accept the same. They also contend that plaintiffs' suit to eject them is barred by the law of limitation.

If, as alleged by the plaintiffs, the defendants came into possession of the land as tenants under the mortgagee, plaintiffs' title to eject them is clear, whether the mortgagee let them into possession as tenants from year to year, or professed to let them as tenants with a permanent right of occupancy. A permanent lease granted by a mortgagee can hold good only as against the mortgagee and that until the redemption of the mortgage. It cannot bind the mortgagor or persons claiming under him. Whether a tenancy created by a mortgagee will *ipso facto* terminate with the redemption of the mortgage, or whether it can be determined only by the mortgagor giving notice to quit as in the case of a tenant from year to year, it is unnecessary to consider in this case, as in fact notice to quit has been given and the suit brought within four years after the redemption of the mortgage.

But if, as alleged by the defendants, their right of permanent occupancy is founded upon a lease granted by the mortgagor, the plaintiffs of course are bound by such lease, and they cannot sue to eject the defendants. This is the substantial question in the case, but both the Courts have dismissed the suit as barred by the law of limitation, under Art. 144 of the Limitation Act, on the ground that the defendants have, to the knowledge of the plaintiffs or rather their predecessor in title, been setting up a right of permanent occupancy for upwards of twelve years before date of suit and that plaintiffs became assignees of the equity of redemption, with notice of such claim on the part of the defendants.

The suit being brought by the plaintiffs as landlords; to recover possession from tenants, the Article of the Limitation Act applicable thereto is *prima facie* Art. 139, and certainly, according to the case of the defendants, that Article must govern the suit. Art. 144 of the Limitation Act can be applied only to a suit not otherwise specially provided for, and if a suit be otherwise specially provided for, the defendants' plea of adverse possession for whatsoever length of time, is perfectly immaterial for purposes of limitation. Both the lower courts have fallen into an error, by no means an uncommon one, *Runchadas Vandravandass v. Parvathy Bhai*, L. R., 26 I. A. 71, that every other Article of the law of limitation, relating to immoveable property, should be subordinate or read subject to Art. 144 and have dismissed the suit as barred by the law of limitation, notwithstanding that, according to the defendants' own case, they did not come into possession of the land as trespassers but as tenants let in by the plaintiffs' predecessors in title.

The land in question was held in proprietary right under a ryotwari settlement with Government by the plaintiffs' predecessor in title, and if, as the defendants allege, they derived a permanent right of occupancy therein from such proprietor, the onus of establishing which is entirely on them (*Rangasami Reddi v. Gnanasammanth Pandara Sannadhi*, I. L. R., 22 M. 264, and the unreported decision in *Chidambara Pillai v. Tiruvengidatha Iyengar* therein cited) it is of course a complete answer to the plaintiffs' suit, inasmuch as it is not based on the footing of the defendants having incurred a forfeiture of a permanent right of occupancy and the suit is bound to fail on that ground. In considering the question of limitation and dismissing the suit on such preliminary ground, it must, of course, be assumed that the plaintiffs' case, i. e., that the defendants came into possession of the lands as tenants from year to year and not as permanent tenants—as alleged by the defendants—is true. If so, it is impossible to uphold the decision of the lower Courts that the defendants have, by adverse possession extending over a period of twelve years, acquired under the combined operation of Art. 144 of the II Schedule and section 28 of the Limitation Act, the limited right of permanent occupancy subject to the payment of a fixed rent. Defendants do not say that they came into possession of the land as trespassers though professing to have

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come into possession as permanent lessees—in which case no doubt Art. 144 would be applicable; nor do they say that the plaintiffs' predecessor in title was dispossessed or that he discontinued possession of the land and that they have taken possession claiming to hold under a permanent right of occupancy, in which case Art. 142 would be applicable, the result in either case being the same. A person who lawfully came into possession of land as tenant from year to year or for a term of years or as mortgagee cannot, by setting up during the continuance of such relation, any title adverse to that of the landlord or mortgagor, as the case may be, inconsistent with the real legal relation between them, and that, however notoriously and to the knowledge of the other party—acquire by the operation of the law of limitation title as owner or any other title inconsistent with that under which he was let into possession. In the case of a mortgage the title of the mortgagor will be extinguished only at the expiration of the periods prescribed for redemption of the mortgage, and in the case of a lease the landlord's title can be extinguished only at the expiration of the period prescribed by Art. 139 of the Limitation Act, and under the latter Article such period will commence to run only when the tenancy is determined. A reference to section 111 of the Transfer of Property Act will show when a tenancy in respect of immovable property determines. If after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner of such limited estate as he prescribes for. A person coming into possession of land under a lease which is invalid or void as against the person seeking to eject him is really a trespasser, and as such after the expiration of the period prescribed by Art. 144, acquires by prescription the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity.

In the present case, on the footing that the defendants were let into possession by the mortgagee, whether as tenants from year to year or professedly as tenants with a permanent right of occupancy, the tenancy between them and the mortgagee would have continued until the redemption of the mortgage in 1894, and such possession cannot be adverse either to the mortgagee or much less to the mortgagor, and the plaintiffs' cause of action would have

accrued—and the period of limitation commenced to run only in 1894 if such tenancy ceases by the mere fact of redemption, or subsequent thereto, when the term of notice to quit had expired, if the right view should be that a lease given by the mortgagee as being incidental to the management of the mortgaged property, is binding upon the mortgagor—at any rate, as a lease from year to year until he determines the same. If, as alleged by the defendants, they were let into possession by the plaintiffs' predecessor in title as tenants, but they fail to establish that they were let into such possession with rights of permanent occupancy, their position will be only that of tenants from year to year (See *Vasudeva Patrudu v. Sri Rajah Sanyasi Raz, &c.*, 3 M. H. C. R., 1) and they can acquire by prescription no right of permanent occupancy by the fact that they were setting up a right of permanent occupancy, to the knowledge of plaintiffs' predecessor in title for upwards of 12 years before the date of suit (*Srinivasa Ayyar v. Muthuswami Pillai*, I. L. R., 24 M. 246).

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There being in this case no plea of dispossession of the mortgagee by the defendants or their assignors as trespassers, it is unnecessary to consider whether in the case of such forcible dispossession against the mortgagor, within the meaning of Art. 144 of the Limitation Act, until the mortgagor had redeemed the mortgage [*Ammu v. Ramakishna Sastri*, I. L. R., 2 M. 226; *Vithoba Bin Chabu v. Gangaram Bin Biramji*, 12 B. H. C. R. (A. C. J.) 180; *Puttappa v. Timmaji*, I. L. R., 14 B. 176; *Chinto v. Janki*, I. L. R., 18 B. 51].

In support of the position that a tenant cannot, by the operation of the law of limitation, prescribe for a higher title than he had under the tenancy, by setting up such higher right during the tenancy, I may quote the following passage from the judgment of their Lordships of the Judicial Committee of the Privy Council in *Maharani Beni Koer v. Dudh Nath Roy*, (26 I. A., 216) at page 224 :—" Their Lordships, however, think that the argument fails on broader ground. They have already expressed their opinion that Ramgolam was, at the time, entitled to hold the mouzah for his life and that no suit for possession could then have been brought against him. And they do not think that a mere notice by a person holding for his life, that he claimed to be holding on a hereditary

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or perpetual tenure, would make his possession adverse within the meaning of the Limitation Act so as to bar a suit for possession on expiration of the life tenancy. Even if therefore the plaint of 1879 did not convey the notice which the respondents attribute to it, their Lordships do not think it would support the defence of limitation." The case of *Budesab v. Hanmata*, I. L. R., 21 B. 509, relied upon by the District Judge, in which it was held that "a landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than 12 years, may be debarred from subsequently questioning the right of the tenant to hold under its terms"—proceeds upon the footing that the tenancy alleged by the landlord to be only from year to year was determined and a suit brought to eject the tenants was dismissed for default of prosecution. According to the case of the landlord, therefore, the tenant remained in possession as a trespasser. He, however, having claimed to hold possession as a tenant with a permanent right of occupancy and such possession having continued for upwards of 12 years after the tenancy was determined, according to the case of the landlord, it was held that he acquired a right of permanent occupancy by prescription. The case is thus clearly distinguishable from the present case.

The case of *Drobomoyi Gupta v. Davis* (I. L. R., 14 C. 323) is also clearly distinguishable from the present case. In that case a Hindu widow granted a permanent lease to certain tenants, which, on her death, was void as against her two daughters, the survivor of whom died nearly 20 years after the death of the widow. The lessees having, as trespassers from the date of the death of the widow, continued to hold the lands for upwards of the statutory period professing to hold the same as permanent tenants under the lease granted by the widow, it was held (at p 345) that they had acquired a right of permanent occupancy by prescription against the daughters and therefore, under the provisions of the Limitation Act (XIV) of 1859, also as against the male reversionary heirs who succeeded the surviving daughter.

In *Gossain Dalmar Puri v. Bepin Behary Mitter*, I. L. R., 18C. 520, a permanent lease of certain mouzahs was granted by the judgment-debtor after his right, title and interest therein had been

sold in execution of the decree and the purchaser who obtained only symbolical possession against the judgment-debtor in a suit brought by him for the recovery of his shares, against the judgment-debtor and his co-sharers, subsequently brought a suit against the alleged permanent lessee by the judgment-debtor, it was void as against the prior purchaser, and the lessee, therefore, was in possession really as a trespasser as against the purchaser, professing to hold for upwards of 13 years the land as a permanent lessee. It was, therefore, held that he acquired a right of permanent occupancy by prescription.

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The decision of the Privy Council in *Tekasetnee Goura Coomaree v. Mussaat Saroo Coomaree*; (19 W. R., 252) which was also cited on behalf of the respondent, has no bearing upon the present case. In that case the plea of limitation was overruled on the ground that the landlord had no notice that the tenant was claiming a permanent right of occupancy. It also appears in that case, that according to the plaintiff's case the tenant was holding wrongfully after the termination of a lease for a term of years.

In *Maidin Saiba v. Nagapa*, I. L. R., 7 B. 96, the tenant had a permanent lease granted to him of certain lands, but he trespassed and encroached upon certain lands not comprised in the lease and professed to hold the same as if it was part of the land comprised in the lease, and such trespass and encroachments having continued for upwards of 12 years, it was held that he had acquired a right of permanent occupancy as regards the land also by the operation of the law of limitation.

It will thus be seen that in the case above referred to, in which it was held that title to right of permanent occupancy in land subject to the payment of a fixed rent was acquired by the operation of the law of limitation, the person who thus acquired title was, at the time from which the period of limitation was reckoned, in possession of the land really as a trespasser under an invalid lease, or under a lease which prior thereto had been determined either by the landlord having given notice to quit or otherwise.

The District Judge having disposed of the appeal on the preliminary question of limitation alone, which forms the subject

of the 7th issue, and as his finding on that issue cannot be supported, the decree is reversed and the appeal remanded to him for disposal according to law with reference to the remaining issues in the case. The costs of this second appeal will follow and abide the result.

6th March 1902.

The defendant contended that he had enhanced the rate subsequently to the settlement, that such enhanced rate was being paid by previous holders or proprietors of the land and that thus there was an implied agreement to pay the enhanced rate and that the suit was barred. The District Munsif held that the plaintiff was liable to pay the enhanced rate. On appeal by plaintiff, the District Judge held that the plaintiff was liable only to pay Kuttubadi at the rate fixed at the time of the permanent settlement, that there was an implied agreement to pay enhanced rate but that the same was invalid under section 12 of Regulation XXV of 1802 and section 23, Contract Act.

S. Gopalasamy Aiyangar for the appellant.

V. Krishnaswami Aiyar and *J. Sundaranana Rao* for respondent.

The Court delivered the following

JUDGMENT :—We think the plaintiff's cause of action arose when each demand for the enhanced rent was made and the suit was not barred.

By the Regulation XXV of 1802, section 3, in all cases of disputed assessment reference shall be had to sunnads and kabuleats and judgment shall be given by the courts of judicature in conformity to the conditions under which the agreement may have been formed in each particular case.

In this case a reference to the kabuleat shows that the Zemindar bound himself not to change the quit-rent. Though the enhanced rate has been paid for a long time, it is not shown that there was any consideration for such enhanced payments and from the defendant's letters, Exhibits A and B, it is clear that he did not, when he wrote them in 1891 and 1894, pretend that he had then any legal right to the enhanced rate, but on the contrary he promised to return the excess. In these circumstances, we should not be prepared to infer from the mere fact of the long continued payments any agreement to continue to pay the enhanced amounts.

We think that the decision of the District Judge was therefore right and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Vedapuratti and others	...	...	Appellants (<i>Defendants 2, 10 and 11</i>).
	<i>v.</i>		
Vallabha Valia Raja and others	..	..	Respondents (<i>Plaintiff, and Defendants 1, 3 to 9, 12 to 14, 16 to 34 and 36 to 46 and 35th defendant's legal representatives</i>).

Vedapuratti *Civil Procedure Code*, Ss. 2, 13, 244 and 540—*Transfer of Property Act*, Ss. 60, 67, 86, 87, 88, 89, 92 and 93—*Limitation Act*, Art. 179, 2nd Schedule—*Court Fees Act*, Schedule II, No. XI—*Government Notification—Specific Relief Act*, S. 42—*First suit for redemption and decree not executed—Second suit barred—Stay of execution—Application for extension—Res judicata.*

Where the plaintiff in a redemption-suit obtains a decree for redemption and fails to execute it by payment of the amount within the time fixed in the decree, he cannot afterwards be permitted to bring a second suit for redemption, whether the mortgagee defendant has or has not obtained an order absolute for foreclosure or for extinguishing the plaintiff's right of redemption. Such second suit will be barred by the rule of *res judicata*.

Sami Achari v. Somasundra Achari, I. L. R., 6 M. 119; *Periandi v. Angappa*, I. L. R., 7 M. 423; *Karuthasami v. Jagannatha*, I. L. R., 8 M. 478; I. L. R., 15 M. 386; *Navappa Chetty v. Chidamlaram Chetty*, I. L. R., 21 M. 18 overruled.

Ramasami v. Sami, I. L. R., 17 M. 96 discussed.

Per C. J.—The remedy will be barred by S. 13 though the right may subsist by reason of there being no order passed under S. 93, T. P. Act.

Obiter.—*Per C. J.*—The equity of redemption remains unforclosed and the relation of mortgagor and mortgagee continues until the order absolute which is contemplated by S. 93, T. P. Act is made.

Obiter.—*Per Moore, J.*—Where a mortgagor (plaintiff in a redemption suit) fails to pay the amount due to the mortgagee (defendant) within the time fixed in the decree for redemption, he may apply to the court for an extension of time (even though no application for order absolute for foreclosure is made by the mortgagee) under the last clause of S. 93, T. P. Act, and the court must grant such application if good cause is shown for such extension.

Per Bhashyam Aiyangar, J.—The mortgagor's right of redemption and his cause of action to sue to establish that right is exhausted by bringing the suit for redemp-

tion and is extinguished by the decree obtained in that suit and is not revived if he fails to execute the decree within the time allowed or allows it to get barred by limitation without applying for an extension as contemplated by the Proviso to S. 93, T. P. Act.

A decree for redemption of a mortgage is not merely a declaratory decree but a decree establishing the plaintiff's right and entitling him to the consequential relief (*vide* ss. 60 and 67, T. P. Act) and a person who has obtained a decree establishing his right and entitling him to the consequential relief cannot again sue for the same but can only work out his right and obtain the relief by executing the decree. A separate suit for the purpose is prohibited by S. 244, C. P. C.

Obiter.—A person obtaining a mere declaratory decree establishing a right of the nature contemplated by S. 42, Specific Relief Act, is not barred from bringing a subsequent suit to obtain a relief consequent upon such right, though the decree will be conclusive in his favor as evidence as to the right adjudicated upon.

Obiter.—Though in regard to the execution of a decree, the initiative will have to be taken by the party entitled to execute the decree, yet in regard to the stay of its execution, the party against whom it may be executed may take the initiative and apply for and obtain stay of execution in anticipation or apply for such stay when motion is made for execution of the decree.

Obiter.—A mortgagor may, after the time fixed in the decree, exercise his right of redemption under the decree, if he is not barred by limitation by obtaining a postponement of the day fixed for payment if he makes out a good cause for such extension of time. An order for extension of time under Ss. 87 and 93 of the T. P. Act is an order for the stay of the execution of the decree within the meaning of S. 244, Cl. (c), C. P. C., and may therefore be made by the court executing the decree and not necessarily by the court passing the decree.

Obiter.—The mortgagor (plaintiff in a redemption suit) may himself apply for sale on default of payment of the mortgage money within the time fixed in the redemption decree in execution of the decree made under the last para of S. 92, T. P. Act.

Obiter.—Decrees under sections 86, 88 and 92 are the final judgments or decisions in the suit and will be appealable as 'decrees' under the 1st part of the definition of 'decree' in S. 2, C. P. C., and applications made under sections 87, 89 and 93 will be governed by Article 179 of Schedule II, Limitation Act, and orders passed thereon will be appealable under section 244, Cl. (c) of the Limitation Act, subject to the payment of the fixed court-fee of Rs. 2 according to Government Notification.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 547 of 1898, presented against the decree of the Subordinate Judge's Court of South Malabar at Palghat in O. S. No. 65 of 1897.

The facts are fully set out by *Moore, J.*, in his judgment in the Full Bench. The litigation is in consequence of the decision of the Full Bench in *Vallabha Valia Rajah v. Vedapuratti*, I. L. R., 19 M. p. 40, which also arose between these very parties.

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P. R. Sundara Aiyar, K. R. Subrahmaniam Sastri, and C. V. Anantakrishna Aiyar for appellants.

K. Brown, C. Sankara Nair and B. Govindan Nambiar for 1st respondent.

Their Lordships (Bashyam Aiyangar and Moore, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The predecessor in title of the present plaintiff brought a suit against some of the present defendants and others to redeem a mortgage of 1858. He obtained a decree directing that, on payment by him into Court of a certain sum on or before a certain date, the defendants should deliver up to him all documents relating to the mortgaged property and re-transfer the said property to him, and that if such payment was not made on or before the date fixed the property should be sold. The plaintiff did not pay within the prescribed date and the defendants did not apply for an order for sale. The plaintiff on making payment after the date fixed was unsuccessful in his attempt to redeem and recover possession and has now filed the present suit to redeem the same mortgage. According to the decisions of this Court in *Sami Achari v. Somasundaram Achari*, I. L. R., 6 M. 119; *Periandi v. Angappa*, I. L. R., 7 M. 423; *Karuthasami v. Jaganatha*, I.L.R., 8 M. 478; and *Nainappa Chetti v. Chidambaram Chetti*, I.L.R., 21 M. 18, such a suit would seem to lie. The defendants rely on the decision in *Ramasami v. Sami*, I. L. R., 17 M. 96, which, however, is in conflict with a dictum of *Shepherd, J.*, in *Vallabha Valia Raja v. Vedapuratti*, I. L. R., 19 M. 40 at page 51. In *Gan Savant Bal Savant v. Narayan Dhond Savant*, I. L. R., 7 B. 467, *Malaji v. Sagoji*, I. L. R., 13 B. 567, and *David Hay v. Razi-ud-din*, I. L. R., 19 A. 202, it has been held that such a will not lie. As there is, therefore, a conflict of decisions and as the point at issue is one of considerable importance, we refer the following question for decision by a Full Bench :—

“ Whether, notwithstanding the institution of a suit and the passing of a decree for redemption, a subsequent suit for redemption of the same mortgage can be brought when the decree in the former suit has not been executed ? ”

The Full Bench expressed the following

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OPINIONS.—*The Chief Justice*:—The question which has been referred in this case is whether, notwithstanding the institution of a suit and the passing of a decree for redemption, a subsequent suit for redemption of the same mortgage can be brought when the decree in the former suit has not been executed. I take it that for the purposes of this reference the words “when the decree in the former suit has not been executed” mean when the order provided for by section 93 of the Transfer of Property Act for foreclosing the right to redeem, or for sale, as the case may be, has not been made.

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The view which has been generally adopted by this High Court, though the decisions are not altogether uniform, is that a second suit will lie. The Bombay and Allahabad High Courts have held otherwise.

The answer to the question appears to me to depend not upon whether or not at the time of the bringing of the second suit the relation of mortgagor and mortgagee subsists between the parties, but upon whether, assuming that the right subsists, the mortgagor is precluded, by the operation of the doctrine of *res judicata* by reason of the adjudication which he has already obtained, from bringing a second suit.

On the construction of sections 92 and 93 of the Transfer of Property Act, it is perfectly clear that the equity of redemption remains unforeclosed and the relation of mortgagor and mortgagee continues until the order absolute which is contemplated by section 93 is made. Section 92 requires the Court if the plaintiff succeeds (*i. e.*, if the plaintiff establishes that he is entitled to the decree which by section 92 the Court is empowered to make) to order that, if the plaintiff pays in pursuance of the order of the Court, certain things shall be done, and that if he does not pay, certain legal consequences shall ensue. Section 93 provides that, if payment in pursuance of the order of the Court has not been made, the defendant may apply, and the Court shall order, that the mortgaged property be sold or the plaintiff's right to redeem be foreclosed, as the case may be; and the section expressly enacts that on the making of an order

Vedapuratti v. Vallabha Valia Raja. Chief Justice. under the section the right to redeem and the security shall both be extinguished. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made. It does not, however, follow that the right is enforceable by means of a second redemption suit. It seems to me that though the right subsists, the remedy is barred by operation of the rule of law which is embodied in section 13 of the Code of Civil Procedure. The legislature has laid down what is the matter in issue in a redemption suit. In order to succeed, the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall re-transfer the property and if necessary, put him in possession? The matter in issue is—aye or no—is the mortgagor entitled to the decree which, if he succeeds, the Court is required by section 92 to make? The question whether a decree under section 92 operates as *res judicata* as a final adjudication on the matter in issue between the same parties is, as it seems to me, entirely different from the question whether such a decree is in itself capable of execution without the order absolute which is contemplated by section 93 having been made.

As regards the authorities, the view which has usually prevailed in this Presidency, as already observed, has been that a second suit will lie.

In the cases reported in *Sami Achari v. Somasundara Achari*, I. L. R., 6 M. 119; *Periandi v. Angappa*, I. L. R., 7 M. 423, and *Karuthasami v. Jagannatha*, I. L. R., 8 M. 478, where it was held that a second suit would lie, the decree in the first suit contained no direction that in default of payment by the mortgagor the equity of redemption should be foreclosed. In the case in which the present reference has been made the decree directed (the mortgage being a *usufructuary* mortgage) that if the mortgagor failed to pay in pursuance of the order of the Court property should be sold. Possibly the present case may be distinguished from the earlier authorities upon this ground, but it seems to me that so far as the question of *res judicata* is concerned, it is immaterial whether or not the decree in the first suit directs that if the mortgagor does not pay as ordered by the Court the equity of

redemption should be foreclosed or the property should be sold. *Vedapuratti*
 The basis of the decision in *Periandi v. Angappa*, I. L. R., 7 M. 423, and in the later Madras cases in which the same view was ^{V. Vallabha}
 adopted, was that at the time the second suit was brought the ^{Valia Raja.} Chief Justice.
 relation of mortgagor and mortgagee still subsisted. But, as I have said, the question is not what are the rights of mortgagor, but what, in the events which have happened, is the legal remedy which is open to him to enforce these rights. In *Ramunni v. Brahma Dattan*, I. L. R., 15 M., 366, the question again came up for consideration and was fully discussed by Sir *Muttusami Aiyar*, J., and Mr. Justice *Best*, who re-affirmed the view adopted in the earlier Madras cases and dissented from that of the Bombay High Court in *Gan Savant Bal Savant v. Narayan Dhond Savant*, I. L. R., 7 B. 467. Sir *Muttusami Aiyar* observes that the Madras decisions are more consistent with the scheme of the Transfer of Property Act, while the Bombay decisions introduce the doctrine of constructive foreclosure founded on the plea of *res judicata*. This observation appears to have been made with reference to the Bombay decision reported in *Malaji v. Sagoji*, I. L. R., 13 B. 567. I agree that any doctrine of constructive foreclosure is foreign to the scheme of the Transfer of Property Act. (As a matter of fact the Transfer of Property Act did not apply in Bombay at the time these two cases were decided). As regards the earlier Bombay case to which I have referred, the judgment of Sir *Raymond West* is not based on any such technical ground but on the general principles of the law of *res judicata*. The precise point came before a Division Bench in *Ramasami v. Sami*, I. L. R., 17 M. 96, where it was held that a second suit for redemption would not lie. I agree with the conclusion at which the Court arrived, but with all respect to the learned judges who decided that case, it seems to me that the matter was *res judicata*, not because the decree under section 92 became final at the expiry of the time fixed for payment thereby, although no order had been made under section 93, but because the matter in issue became *res judicata* as between the parties from the time the mortgagor's right to redeem was adjudicated on by a decree made under section 92. In the Full Bench case, *Vallabha Valia Rajah v. Vedapuratti*, I. L. R., 19 M. 40, the question referred was whether, after the expiration of the time mentioned in the decree and before

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any order for sale, the mortgagor is precluded from redeeming the property. The actual point decided was that after the expiration of the time mentioned in the decree and before any order for sale, it was not open to the plaintiff to apply for execution of the decree. The question now before us was only dealt with incidentally in that case, and the decision cannot be put higher than that the learned judges dealt with the case before them upon the assumption that a second suit will lie, and that the earlier Madras cases, assuming them to be good law, show that the mortgagor who has allowed the time fixed for payment to expire, is not without a remedy. It is to be observed that in the case which came before the Full Bench there had been no formal application for an extension of time, and the question whether there is power to extend the time on the application of the mortgagor after the expiry of the time fixed, and without any application for sale or foreclosure being made by the mortgagee, appears to be still open so far as the decisions of this High Court are concerned. In Bombay it has been expressly held that under the proviso to section 93 of the Act, an application to extend the time for redemption fixed by the original decree may be made at any time before the order absolute is made (I. L. R., 22 B. 71). In the case reported in *Nainappa Chetty v. Chidambaram Chetty*, I. L. R., 21 M. 18, a Division Bench again adopted the view which has usually prevailed in this Court and held that inasmuch as the relation of mortgagor and mortgagee had not been put an end to, a second suit would lie. The learned judges, however, were of opinion that though the right of the mortgagor for a decree under section 92 was not *res judicata*, the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*. With all deference it seems to me that for the purpose of the question of *res judicata*, it is difficult to make a valid distinction between the findings of fact as to the conditions upon which the mortgagor is entitled to redeem and the adjudication in law that the mortgagor is entitled to redeem on complying with certain prescribed conditions.

As regards the Bombay authorities I have already referred to *Gan Savant Bal Savant v. Narayan Dbond Savant*, I. L. R., 7 B. 467, and *Malaji v. Sagoji*, I. L. R., 18 B. 567. As regards the latter case, it is not necessary to express an opinion as

to whether, in so far as the decision goes beyond the point now before us, the case was rightly decided.

As regards the Allāhabad High Court, the question was considered by Sir *John Edge* and Mr. Justice *Blair* in *David Hay v. Razi-ud-din*, I. L. R., 19 A. 202, and by Sir *Arthur Strachey* and Mr. Justice *Knox* in *Dudh Bahadur Rai v. Tek Narain Rai*, I. L. R., 21 A. 251. In the former case the learned judges expressed the view that a second suit was precluded by section 13 of the Civil Procedure Code.

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In the latter case it was held that the dismissal of a suit for redemption on the ground that the mortgagor had not prior to its institution paid or tendered the mortgage money at a time authorised by the deed, did not operate as foreclosure or *res judicata* so as to bar a second suit. It seems to me that this case may be distinguished on the short ground, that the cause of action in the second suit was different from that in the first. Prior to the institution of the first suit tender as authorised by the deed had not been made. Prior to the institution of the second suit such tender had been made. Further, in the Allahabad case the mortgagor's suit had been dismissed, whilst in the present case the mortgagors obtained the decree for which he sued. It may well be that the English rule that a suit for the redemption of a legal mortgage which is dismissed for any reason except want of prosecution operates as a decree for foreclosure (see *Marshall v. Shrewsbury*, L. R., 10 Ch. App., 250) has no place in the Indian law of mortgage. If it has not, the equity of redemption in such a case would remain unforeclosed, but, it does not follow that a mortgagor who has brought his suit and failed can seek the aid of the Court by another suit for the purpose of enforcing his right. Still less does it follow when the mortgagor has brought his suit and obtained an adjudication for foreclosure on payment, that a second suit is maintainable. As pointed out by Sir *Arthur Strachey*, the incidents of a Welsh mortgage closely resemble those of a usufructuary mortgage under the Transfer of Property Act, and the learned judge himself suggests that the decision in *Curtis v. Holcombe*, 34, R. R., 305 (where the mortgagor filed a bill for the redemption of a Welsh mortgage and obtained a decree) might be analogous to a case where, as here, the plaintiff obtained the decree

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Chief Justice. for which he asked, though it was not analogous to the case before the Allahabad High Court where the plaintiff failed to obtain a decree. Moreover, Sir *Arthur Strachey* expressly distinguishes the earlier Allahabad decision (*Hay v. Razi-ud-din*, I. L. R., 19 A. 202) upon the ground that in that case there was a prior decree for redemption. He observes, "It is sufficient to say that, in our opinion, the principle of *Hay v. Razi-ud-din*, (I. L. R., 19 A. 202) should not be extended to a case where no decree for redemption has been passed prior to the suit before the Court."

As regards the Calcutta High Court, the only two decisions to which our attention has been called which bear upon the point (*Siva Pershad Maity v. Nundo Lall Kar Mahapatra*, I. L. R., 18 C. 139 and *Roy Dinkur Doyal v. Sheo Golam Singh*, 22 W. R., 172) appear to be in conflict.

For the reasons which I have stated, I think the answer to the question which has been submitted to us should be in the negative.

Davies, J.—The question is whether a mortgagor who has once obtained a decree for redemption can, under any circumstances, bring a second suit for the same relief. The solution of the question seems to me to lie in a nutshell. If the decree the mortgagor has obtained is a final decree as the majority of the Court has held in the reference to the Full Bench in A. A. O. No. 156 of 1900,* a second suit must undoubtedly be barred as *res judicata* under section 13 of the Code of Civil Procedure. If, as the minority of this Court has held in the same reference, the decree the mortgagor has obtained is only a preliminary decree, then the suit is still pending and a second suit is debarred under section 12 of the Code. On these grounds alone I would decide that no second suit is sustainable.

The particular reason for the opinion that a second suit for the redemption of a mortgage is admissible apparently is that the right to redeem subsists apart from the decree for the whole period of sixty years during which a suit or suits for redemption may be brought. But if that argument were sound any other right, for instance, the right to recover a debt, would also subsist until the

* Since reported.—*Vide Mallikarjunadu Selli v. Lingamurti Pantulu*, I. L. R., 6 M. 244.

period of limitation for bringing a suit to enforce it had elapsed. There seems to be no difference between the cases. I am not aware of any special sanctity about a right to redeem which places it on a higher footing than any other legal right in respect to the enforcement of it by a suit. In my opinion, they are all subject to the same processual law, namely, that once any right has been enforced by a suit in which a decree has been obtained, the decree becomes the embodiment of that right, and that right in its inchoate state is merged in the decree. If a second suit is allowable in any case, it must be allowable in all cases, and there is no reason why if a second suit is allowed there should not be a third, a fourth or a fiftieth suit on the same cause of action so long as the cause of action remained unbarred by limitation. In the case of a right to redeem, such suits might be brought for 60 years from the date of the mortgage, and if in any suit so brought the mortgage was acknowledged, as it could hardly fail to be, a fresh starting point for the sixty years' limitation would begin from the date of such acknowledgment, and the right to sue would thereby become in practice everlasting. I consider that this *reductio ad absurdum* conclusively shows that no second or further suit lies in a case where there has once been a suit for redemption and a decree whether preliminary or final has been obtained therein.

My answer to the reference would therefore be emphatically in the negative.

Bhashyam Aiyangar, J.—The circumstances which have led to the institution by the 1st respondent of this second suit for redeeming the mortgage of 1858 for the redemption of which identical mortgage he had already obtained a decree in O. S. No. 3 of 1889 will be found fully set forth in the case reported in I. L. R., 19 M. 40. The mortgage being a usufructuary mortgage, the decree in O. S. No. 3 of 1889 did not provide for foreclosure of plaintiff's right to redeem in default of payment within the time fixed in the decree for redemption, but only provided for sale of the mortgaged property (*vide* last paragraph of section 92, Transfer of Property Act). It does not appear that plaintiff ever applied under the proviso to section 93 for extending the time fixed for payment; but without obtaining any such extension he unsuccessfully attempted to redeem and recover pos-

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Vedapuratti session of the mortgaged property by payment into Court after the day appointed. In *Vallabha Valia Rajah v. Vedapuratti*, I. L. R., 19 M. 40, it was assumed, following the opinion expressed in the decisions of this Court in *Elayadath v. Krishna*, I. L. R., 13 M. 267, 268, and *Kanara Kurup v. Govinda Kurup*, I. L. R., 16 M. 214, 218, that the proviso was only intended to come into play when an application has been made by the mortgagee—the defendant—for the final order for foreclosure or sale, to which he may be entitled under paragraph 2 of section 98 (Transfer of Property Act). Such assumption is possibly due to the circumstance that the proviso has been inserted in sections 87 and 93 and not in 86 and 92. The reason for not inserting it in sections 86 and 92 which relate to the passing of decrees in foreclosure and redemption suits respectively, seems to me to be obvious. If it was so inserted, the order postponing the day fixed for payment will be one for amendment of decree and will have to be passed by the Court which passed the decree, either in the first instance or on appeal confirming, varying or reversing the original decree, whereas by inserting the proviso in sections 87 and 93, the order postponing the date of payment will operate as an order passed in execution proceedings relating to the stay of execution of the decree within the meaning of section 244, cl. (c) of the Civil Procedure Code [*Hulas Rai v. Pirithi Singh*, I. L. R., 9 A. 502 (note); *Rahina v. Nepal Rai*, I. L. R., 14 A. 520], and can be passed by the Court executing the decree, though such Court may be different from the one which passed the decree. Though in regard to the execution of a decree the initiative will have to be taken by the party entitled to execute the decree, yet in regard to the stay of its execution, the party against whom it may be executed may take the initiative and apply for and obtain stay of execution in anticipation or apply for such stay when motion is made for execution of the decree. Under the English law, as pointed out by *Shephard, J.*, in I. L. R., 19 M. 40 at p. 50, the time for payment may be extended either on the independent motion of the mortgagor—the plaintiff—or on the hearing of an application by the mortgagee—the defendant—to make the foreclosure absolute (*Alden v. Foster*, 5 Beav. 592; *Jones v. Creswicke*, 9 Sim, 307, 317) and I entirely fail to see anything in the language of sections 87 and 93 of the Transfer of Property Act, to show that the salutary English

practice was intended to be departed from and that the proviso for extension of the time fixed for payment cannot be availed of by the mortgagor unless and until an application is made by the mortgagee for an order for foreclosure absolute or for sale, an application which, in the nature of things, can be made only after the period fixed for redemption has expired. I can conceive of no intelligible reason for imputing such intention to the Indian Legislature. As observed in my judgment in A. A. O. No. 156 of 1900 (written some days ago and before this reference came on for hearing though pronounced only to-day), the use of the word 'postpone' in the proviso to sections 87 and 93 of the Transfer of Property Act, clearly indicates that, as a general rule, the application for extension of the time fixed for payment is assumed to be made before the day fixed for payment and therefore, by the mortgagor, before the mortgagee applies for an order absolute for foreclosure or sale. In the present case, the mortgagee not having chosen to apply—evidently because he was in possession and the time fixed for redemption had expired—under paragraph 2 of section 93 for an order that the mortgaged property be sold, it was assumed that the mortgagor could apply for no extension of time and it was pointed out (I. L. R., 19 M. 40 at p. 52) that if the law as laid down in the previous decisions of this Court (in I. L. R., 6 M. 119; I. L. R., 7 M. 423; I. L. R., 8 M. 17 and I. L. R., 15 M. 366) was good law, he was not without remedy and could bring a second suit for redemption. The possibility of the mortgagor—the plaintiff—himself applying for an order for sale of the mortgaged property in pursuance of the decree which directed sale of the property in default of payment within the time fixed was not considered. In a suit for foreclosure, the mortgagor—the defendant—may under paragraph 2 of section 88, apply for and obtain a decree for sale in lieu of foreclosure, though under section 87 (Transfer of Property Act) the mortgagor, as plaintiff, could bring no suit for sale, as he could in England under section 25 of the Conveyancing and Law of Property Act, 1881. Notwithstanding that section 93 (Transfer of Property Act) deals only with a mortgagee's application for an order for sale, it would on principle seem that there could be no objection to the mortgagor applying for execution of the decree passed under section 92 and obtaining an order for sale of the mortgaged property, the sale of

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which has been decreed under the last paragraph of section 92 in case payment is not made on or before the day fixed in the decree for redemption.

Turning now to the general question referred to the Full Bench—apart from the special facts of the case in which the question has arisen, I am clearly of opinion that the present suit for redemption of the very same mortgage, for the redemption of which a decree had already been obtained in O. S. No. 8 of 1889 is barred as *res judicata* by section 13, Civil Procedure Code, and is also barred by section 244, Civil Procedure Code, notwithstanding that no order absolute for sale has been passed in the former suit.

In *Kameswar Pershad v. Rajkumari Ruttan Koor*, (I. L. R., 20 C. 79 at p. 86) the Judicial Committee of the Privy Council, advertng to section 13, Civil Procedure Code, held that neither the Procedure Code of 1877 nor that of 1882 introduced any new law, but only put into the form of a Code that which was the state of the law at the time, and that the state of the law at the time was that persons should not be harassed by continuous litigation about the same subject-matter. Though the wording of section 13, Civil Procedure Code, is not as felicitous as one might wish, it virtually reproduces the firmly established law of *res judicata*, viz., that a final decision by a Court of competent jurisdiction of a matter directly and substantially at issue between certain contending parties, shall as a plea be a bar and as evidence be conclusive in any subsequent suit between the same parties. Explanation IV to the section makes it clear that interlocutory orders or decisions, or preliminary decrees, if there be any such under the Indian law, are not 'final decisions,' within the meaning of the section, having the force of *res judicata*.

In addition to the cases of *Ex parte Chinery* (L. R., 12 Q. B. D., at p. 345) and *Smith v. Davies*, (L. R., 31 Ch. D. 595) which I cited in my judgment in A. A. O. No. 156 of 1900* as explaining what a final judgment in law strictly is as distinguished from an 'order,' I may refer to Daniel's Chancery Practice (6th edition), page 788, in which it is laid down that 'where a judgment does not adjourn the consideration of the cause,' it is said to be a final judgment and to the following extract from the judgment delivered by

Story, J., in *Whiting v. Bank of the United States*, (decisions of the Supreme Court, United States, America, 13 Peters at p. 15) :—
 “That depends upon this; whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a Court of equity and the proceedings on that decree a mere mode of enforcing the rights of the creditor and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the Court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final upon those merits, as soon as it was pronounced in order to prevent an irreparable mischief to themselves. For if the sale had been completed under the decree the title of the purchaser under the decree would not have been overthrown or invalidated even by a reversal of the decree; and consequently, the title of the defendants to the lands would have been extinguished; and their redress upon the reversal would have been of a different sort from that of a restitution of the land sold. In *Ray v. Law*, 3 Canch 179, it was held by this Court, that a decree for sale of mortgaged premises was a final decree in the sense of the Act of Congress upon which an appeal would lie to the Supreme Court. This decision must have been made on the general ground that a decree final upon the merits of the controversy between the parties is a decree upon which a bill of review would lie without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree like the award of an execution at law.” It is therefore abundantly clear that a decree for redemption passed under section 92 (Transfer of Property Act) is a final judgment or decision within the meaning of section 13, Civil Procedure Code, and falls within the first part of the definition of ‘decree’ in the Civil Procedure Code. Until the suit reaches that stage, it can, under section 373, Civil Procedure Code, be withdrawn with liberty to bring a fresh suit or under section 375 be adjusted by any lawful agreement or compromise in accordance with which a decree may be passed so far as it relates to the suit and issues may be amended or additional issues framed

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under section 149, Civil Procedure Code. Though in one sense, the suit is pending [*Salt v. Cooper*, 16 Ch. D. at p. 551; *Collinson v. Jeffery*, (1896) 1 Ch. at p. 646] until the decree or judgment is worked out and satisfied, and proceedings in execution thereof are 'proceedings in suits' (explanation to section 647, Civil Procedure Code), yet after the decree (*vide* section 375 A, Civil Procedure Code) the suit cannot, unless the same be carried and is pending in appeal, be withdrawn with liberty to bring a fresh suit nor superseded or varied by a compromise or adjustment except in one or two particulars (section 206, Civil Procedure Code). I presume that no one will seriously contend that a suit for foreclosure, sale or redemption can be withdrawn with liberty to sue again, after decree has been passed under sections 86, 88 or 92 (Transfer of Property Act).

In I. L. R., 21 M. 18, while holding that a second suit for redemption was maintainable in accordance with certain previous decisions of this Court, the decree in the first suit passed under section 92 (Transfer of Property Act) was held to be a final judgment operating as *res judicata* as to the relation between the parties, of mortgagor and mortgagee in respect of the subject-matter of the suit and also as to the amount due for redemption at the date of the former decree. I should fully concur in the decision of this Court in I. L. R., 21 M. 18, holding that in that case a subsequent suit for redemption was maintainable, if the decree in the former suit had been—as in fact it was not—a mere declaratory decree, not capable of execution, establishing the relation of mortgagor and mortgagee and the state of the account between the mortgagor and mortgagee at the date of the said decree, assuming that such a decree could have been passed.

If the order absolute for foreclosure or sale under section 93 is alone to be regarded as the final judgment or decision in the suit, that alone can operate as *res judicata* and the decree passed under section 92 will have to be regarded simply as an interlocutory order or proceeding which cannot have the force of *res judicata*. If this be the right view and if no order for absolute foreclosure or sale be passed, the suit will have to be regarded as still pending, and section 12, Civil Procedure Code, will operate as a bar to the trial of a second suit for the same relief between the same parties.

In *Lockyer v. Ferryman*, (L. R., 2 A. C., page 519) on the authority of which it was held by the High Court of Bombay (I. L. R., 7 B. 467) that a decree for redemption, on default of the decree-holder to pay the money within the time fixed in the decree, or if none be fixed, within the time allowed by law for execution of the decree, operates as a judgment of foreclosure and debars the mortgagor from afterwards bringing a second suit for redeeming the same property—Lord Selborne laid down that “when there is *res judicata* the original cause of action is gone and can only be restored by getting rid of the *res judicata*.” Lord Blackburn there explained the principle of *res judicata* as follows:—“When a competent tribunal having had a case before them have given a final judgment, it is *res judicata*. I do not mean to express any opinion as to what would be a sufficient ground to re-open the case * * * *. The object of the rule of *res judicata* is always put upon two grounds—the one, public policy, that is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause.” Again, Lord Penzance, in his judgment in *Kendall v. Hamilton*, (L. R., 4 A. C. 504 at p. 526) says, “when that which was originally only a right of action has been advanced into a judgment of a Court of record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron Parke in *King v. Hoare*, (13 M. and W. 494 at p. 504). He says; ‘The judgment is a bar to the original cause of action because it is thereby reduced to a certainty and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendants to another suit for the purpose of attaining the same result. Hence the legal maxim ‘*Transit in rem judicatum*’; the cause of action is changed into matter of record which is of higher nature and the inferior remedy is merged in the higher.’”

The whole argument in support of the contention that a second suit for redemption is maintainable in the absence of an order absolute for foreclosure or sale proceeds upon the supposition that in spite of the express declaration (in section 2 (a) of the Transfer of Property Act) that nothing therein contained shall be deemed to affect the provisions of any enactment not thereby expressly re-

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pealed, there is some magic in sections 86 to 93 of the Transfer of Property Act and in particular in the word 'absolute' or 'absolutely' therein occurring, which overrides the fundamental principle of *res judicata* embodied in section 13, Civil Procedure Code. Section 60 (Transfer of Property Act) defining the mortgagor's right to redeem specifies the actual remedies which he is entitled to in exercising his right of redemption, the remedies, of course, being such as he would obtain in enforcement or execution of the redemption decree. Similarly, section 67 in defining the mortgagee's right to foreclosure or sale specifies the remedy he is entitled to in exercising such right, *i. e.*, an order that the mortgagor shall be absolutely debarred of his right to redeem or an order that the mortgaged property be sold. Such definition of the mortgagor's right of redemption and of the mortgagee's right of foreclosure or sale was relied on in the course of argument in A. A. O. No. 156 of 1900 as leading to the conclusion that the decrees passed under sections 86, 88 and 92 are only 'preliminary decrees' or decrees *nisi*, and that the 'final decrees,' capable of execution in the suits are the orders passed under sections 87, 89 and 93, respectively. In my opinion the inference to be drawn is just the opposite. If you want to define the right which a creditor has against his debtor, you will have to say that he is entitled to be repaid the amount of the debt and not simply to a decree against his debtor for such payment. Sections 60 and 67, therefore, declare what the mortgagor or mortgagee is actually to realize by enforcing his right, *i. e.*, the relief which he is entitled to by enforcing or executing the decree establishing his right. In the case of redemption, delivery back of the mortgage deeds, possession of the mortgaged property and a re-conveyance are the reliefs (see section 60, Transfer of Property Act) which the mortgagor obtains by executing his decree for redemption. As the provisions of the Civil Procedure Code are sufficient to work out a decree for redemption, no special provisions for the same are made in the Transfer of Property Act, except for the mortgagor being put in possession of the mortgaged property. Even this last seems superfluous (*vide* section 263, Civil Procedure Code); but, whether superfluous or not, the provision made for it in the first paragraphs of sections 87, 89 and 93 conclusively shows that those sections relate to the enforcement or execution of the de-

crees passed under sections 86, 88 and 92, and it is significant that sections 87, 89 and 93 do not provide for the passing of an order absolute for putting the mortgagor in possession, but only for the executive act of putting him in possession.

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In the case of a foreclosure decree, there is nothing in the Civil Procedure Code as to the mode of enforcing the same. The second paragraph of sections 87 and 93 (Transfer of Property Act) provide that the same is to be enforced by obtaining an order of Court debarring the mortgagor absolutely of all right to redeem. This is the mode provided by the Transfer of Property Act, following the English Chancery Practice, for working out or executing a decree for foreclosure passed under section 86 or 92 (of the Transfer of Property Act) as the case may be. In addition to such order, it is provided that the Court *may* enforce the decree, if necessary; also by delivery of possession of the property to the mortgagee (see end of the 2nd paragraph of section 87 and of the 3rd paragraph of section 93) though the decree itself does not in terms provide for such delivery of possession as it does in the case of delivery of possession to the mortgagor. I have already explained in my judgment in A. A. O. No. 156 of 1900, that an application made under section 89 or 93 for an order absolute for sale is only an application for execution of the decree for sale passed under sections 88 and 92 and indicated the reasons for special provision being made in the Transfer of Property Act for the passing of such order for sale. Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed. But the Transfer of Property Act does not provide for an application being made by the mortgagor, after such payment, for an order absolute for redemption, or for the passing of any such order. This conclusively shows that the decrees passed under sections 86, 88 and 92 are not 'preliminary decrees' or decrees *nisi*, which require to be perfected by being made absolute or unconditional, on the fulfilment of a condition or contingency subject to which the decrees were passed. But so far as the decree is one for foreclosure or sale, provision is made for the mortgagee applying for an order absolute for foreclosure or sale as the case may

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be, to supplement the imperfect provisions of the Civil Procedure Code relating to the enforcement or execution of decrees. Decrees for specific performance, decrees respecting rights of easement and similar decrees are often made conditional, but they are not the less 'final judgments' having the force of *res judicata*. This, I venture to state, is equally so under the English law and all decrees whether conditional or unconditional are to be worked out and enforced in execution and the orders passed therefor are not to be regarded as 'the final judgment or decree in the suits, but only as orders relating to the execution of the decree (*vide* R. S. C. Ord. 42 r. 9; Ann. Pract: 1902, p. 571).

In *Monkhouse v. Corporation of Bedford* (17 Ves. 380) the plaintiff—the mortgagee—having obtained the usual decree for foreclosure, at the Rolls as mortgagee, and an appeal therefrom having been preferred to the House of Lords by the mortgagor, before the order for foreclosure absolute was passed, a motion was made by the mortgagor—the defendant—before the lower Court to suspend the execution of the decree until six months after the appeal should have been heard. The lower Court in granting the application on certain terms stated as follows:—"This decree must therefore be taken to be right to the extent of letting execution upon it, unless the Court sees that if it turns out to be wrong the party cannot be set right again." It will be observed that in that case the decree from which an appeal was preferred to the House of Lords was the usual decree in an action by a mortgagee for foreclosure or sale, corresponding to that under section 86 of the Transfer of Property Act and that it was treated as the final judgment in the action and as one capable of being enforced by execution pending appeal (see also *Finch v. Shaw*, 20 Beav. 555). Similarly here also, pending appeals and second appeals from the original decree, the Court whose duty it is to execute the decree may stay execution of the same by postponing from time to time, under the proviso to sections 87 and 93, the day fixed for payment. After the passing of the decree referred to in sections 86, 88 and 92, the cause is not adjourned for further consideration, but an order for foreclosure absolute or for sale may, in execution of the decree, be, under the English law, obtained on application made *ex parte*, supported by an affidavit, by the mortgagee or his attorney, of due attendance

at the place appointed for payment and of non-payment of the Vedapurattir amount certified to be due (see Ann. Practice for 1902, p. 773) and under the Indian law, on a verified application made under sections 230 and 235, Civil Procedure Code.

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The conclusion I have arrived at both in the references made to the Full Bench in A. A. A. O. No. 35 of 1901 and A. A. O. Nos. 48 and 156 of 1900*, and in this case, as to the scheme of the mortgage chapter in the Transfer of Property Act and its relation to chapter XIX of the Civil Procedure Code, is, I venture to say, not only in strict conformity with the Transfer of Property Act—which in this respect is substantially the same as the English Chancery law—but also steers clear of the innumerable difficulties, as to the right of appeal, the period of limitation for applications under sections 87, 89 and 93, the Court which is competent to pass the orders therein mentioned, the Court fees payable in respect of appeals, &c., which will result from the position taken by the Calcutta High Court that a decree passed under sections 86, 88 or 92 of the Transfer of Property Act is only a preliminary decree or decree *nisi* and that it is the order passed under sections 87, 89 or 93 that constitutes the final decree or decree absolute. In the view that the decrees under sections 86, 88 and 92 are the final judgments or decisions in the suit, they will be appealable as 'decrees' according to the first part of the definition of 'decree' in the Civil Procedure Code, and applications made under sections 87, 89 and 93 will be governed by Art. 179 of the 2nd schedule to the Limitation Act and orders thereon can be passed by the Court executing the decree and will be appealable as orders passed under section 244 (c), Civil Procedure Code, comprised within the second part of the definition of 'decree' in the Civil Procedure Code—subject according to the notification of the Government of India to the payment of the fixed Court fee prescribed by No. 11 of schedule 2 of the Court Fees Act.

The learned counsel for the respondent contends—and this is the contention principally relied on by him—that even if the decree passed under section 92 in the former suit be regarded as the final judgment or decision within the meaning of section 13, Civil Proce-

*L. L. R. 25 M. 244.

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dure Code, the right to redeem still subsists, inasmuch as no order absolute for sale has been made under section 93—which alone can extinguish that right—and that, therefore, the decree in the former suit can be no bar to the mortgagor enforcing his right of redemption in the present suit, the relation of mortgagor and mortgagee still continuing and the right of redemption being inseparable from such relation.

In support of this contention he relies upon the decisions of this Court, reported in I. L. R., 6 M. 119, 7 M. 423, 8 M. 478, 15 M. 366 and 21 M. 18, which led to the order of reference to a Full Bench in this case, as they are in conflict with the decisions of the Bombay High Court in I. L. R., 7 B. 467 and 13 B. 567, and of the Allahabad High Court in I. L. R., 19 A. 203, and not reconcilable with the decision of this Court in I. L. R., 17 M. 96 if the dictum of *Shephard, J.*, in I. L. R., 14 M. at p. 51, that 'it would make no difference whether or not the decree pleaded in bar contained a direction for foreclosure or sale' were sound. In the cases reported in 6, 7, 8, 15 and 21 Madras series—in all of which it was held that a second suit for redemption was maintainable—the decree in the first suit which was pleaded in bar contained no directions for foreclosure or sale in default of redemption. In the first of these cases, the decree in the first suit was left unexecuted for 15 years, but it was regarded in the events which have happened as a declaratory decree, though he was entitled under that decree to recover possession on making a certain payment and the second suit for redemption which was based on the original mortgage was held maintainable. In the second case, the execution of the decree passed in the first suit was barred by limitation, the second suit for redemption was held maintainable on the ground that the relation of mortgagor and mortgagee still subsisted and the right to redeem was inseparable from such relation so long as it existed. The same view was taken in I. L. R., 15 M. 366. These decisions were followed in I. L. R., 21 M. 18, but in all these cases the decision proceeded expressly on the ground that the decree in the first suit which was pleaded in bar contained no direction for foreclosure or sale in default of payment. But I agree with the dictum of *Shephard, J.*, (in 19 M. at p. 51) already referred to that inasmuch as it is the order of foreclosure absolute or sale that extin-

guishes the right of redemption and not the mere passing of the decree with a direction for foreclosure or sale in the event of non-payment on or before the day fixed, it can make no difference whether the decree did or did not contain a direction for foreclosure or sale. In the present case, the decree in the first suit did contain a direction for sale in default of payment, but for the reasons already stated, the mortgagee, the defendant, did not choose to apply for an order absolute for sale. This case is like that reported in I. L. R., 17 M. 96, in which it was held that a subsequent suit for redemption was barred by a decree for redemption in a former suit—which decree provided that in default of redemption within the time limited thereby the right of redemption was to be foreclosed—though no order for foreclosure absolute had been made under section 93. But if the decisions of this Court in the other cases are sound, (*i. e.*, in 6, 7, 8, 15 and 21 Madras) the case in 17 Madras and the present case cannot be logically distinguished therefrom simply on the ground that in those cases the decree in the first suit contained no direction for foreclosure or sale.

With all deference to the learned judges I find it impossible to adopt the reasoning on which the decisions of this Court in 6, 7, 8 and 15 Madras proceed and the conclusions arrived at therein. If those decisions are sound, there can be no limit to the number of successive suits for redemption of the same mortgage and the fundamental principle on which the doctrine of *res judicata* is founded will have to be wholly ignored. If the principle of these decisions be—as it must—that so long as the relation of mortgagor and mortgagee is not extinguished by act of parties or by order of Court under sections 87, 89 or 93 of the Transfer of Property Act, or by section 28 of the Limitation Act, the right of redemption is inseparable from such relation and that, therefore, there can be no impediment to the mortgagor's bringing a suit for redemption although he had already obtained a decree for redemption, it will necessarily follow that he can institute in succession as many suits as he chooses for redeeming one and the same mortgage and the mortgagee as many suits as he chooses for foreclosure or sale; for the right of redemption and the mortgage security are not extinguished until the passing of an order for foreclosure absolute or for sale. Even if the execution of the decree in the first suit be not barred by limitation, there will be nothing to prevent his instituting another suit for

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redemption, foreclosure or sale as the case may be. And if he can do so there will be nothing to preclude the defendant in the subsequent suit from applying, in execution of the decree in the former suit, for redemption, or for an order for foreclosure absolute or for sale as the case may be, if the execution of the decree therein be not barred by the law of limitation.

In considering whether the plea of *res judicata* operates as a bar to the suit, the question is not whether the alleged relation of mortgagor and mortgagee or any other legal relation between the parties to the suit subsists, but whether, assuming the same to subsist, the plaintiff is not precluded from seeking to enforce his right by reason of his having already sued upon the same cause of action and obtained an adjudication which it was competent for him to enforce and execute. If one obtains a mere declaratory decree establishing a certain right, of the nature contemplated in section 42 of the Specific Relief Act and thereafter brings a subsequent suit to obtain a relief consequent upon such right, the decree in the former suit cannot as a plea be a bar to the subsequent suit, though as evidence it will be conclusive in his favour as to the right adjudicated upon therein. But a person who has obtained a decree establishing his right and entitling him to the consequential relief, cannot again sue for the same but can only work out his right and obtain the relief by executing the decree. And section 244, Civil Procedure Code, expressly prohibits a separate suit for the purpose.

Applying this principle to a mortgagor's right of redemption, we find a complete definition of that right or cause of action in section 60 of the Transfer of Property Act. The former suit in the present case was founded upon that cause of action and after a decree had been given therein under section 92 of the Transfer of Property Act, the "original cause of action is gone and can only be restored by getting rid of the *res judicata*" as observed by Lord Selborne in *Lockyer v. Ferryman*, above referred to. The cause of action having thus been exhausted, there is no original cause of action, either in whole or in part, on which the mortgagor can again sue for redemption. If he allowed the execution of that decree to become barred or was otherwise unable to execute the decree by reason of his not complying with the terms of the decree, the original cause of action or any portion thereof, will not thereby revive.

Under the proviso to section 93 of the Transfer of Property Act, it was, in my opinion, competent for him to obtain postponement of the day fixed for payment of the money, provided he satisfied the Court that there was good and sufficient cause for his not being able to pay the amount on or before the day fixed. If he can be allowed to bring a fresh suit for redemption, this provision of the Transfer of Property Act that the time for redemption could be extended only on good cause, will be indirectly evaded.

It is true that until there is an order for foreclosure absolute or sale the right of redemption is not extinguished and there was no such order in the present case. That will not entitle him to bring a new suit for redemption, but he can exercise his right of redemption under the decree, if he be not barred by limitation, by obtaining a postponement of the day fixed for payment, if he makes out a good cause for such extension of time. That the decree itself does not operate to extinguish the right of redemption by efflux of the time limited in the decree, but such extinguishment is postponed until the actual passing of an order for foreclosure absolute or sale, is really a concession in favour of the mortgagor so as to enable him to obtain an extension of time on good cause shown, even after the expiration of the period fixed in the decree, whereas if the decree itself operated so as to extinguish the right of redemption on the expiration of the period fixed in the decree, such extension cannot be made and, in fact, if made, will be inoperative. Full effect is thus given to the provision made in the Transfer of Property Act in accordance with the Chancery Practice in England, for extinguishing the right of redemption only on the passing of an order for foreclosure absolute or sale, the only difference between the English and Indian laws being that under the former the order dismissing the suit for redemption in default of payment operates as the order of foreclosure absolute here passed under section 93 of the Transfer of Property Act.

In the case of mortgage-decrees there is provision made for extinguishment of the security and of the right of redemption, but in the case of decrees in ejectment and other decrees there is no such provision, and section 28 of the Limitation Act applies only to suits and not to the execution of decrees. If the owner of property obtains a decree in ejectment against a trespasser or a

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tenant whose tenancy has expired, can he bring another suit in ejectment on his original cause of action as owner or landlord on the ground that his ownership has not been extinguished by the decree in the former suit or by any order passed therein in a subsequent decree? If a mortgagor is to be at liberty to bring successive suits for redemption subject only to the extraordinarily long period of limitation applicable to suits for redemption, it will be difficult to discover or suggest a reason for denying such liberty to the owner of property who seeks to eject a trespasser subject, of course, to the comparatively short period of limitation applicable thereto. There are numerous instances in which the right of action alone is extinguished or destroyed, though the right of property to which it relates has not been extinguished. Thus if a suit is dismissed under section 102; Civil Procedure Code, for default of plaintiff's appearance or the plaintiff withdraws the same (section 373, Civil Procedure Code) without obtaining permission to bring a fresh suit on the same cause of action, the right of action is extinguished and he is precluded from bringing a fresh suit on the same cause of action though his substantive right of property may not be extinguished and the dismissal or withdrawal may not even operate as *res judicata* against him in respect of his right of property. Similarly, if a plaintiff omits to sue in respect of any portion of his claim, he is precluded (section 43, Civil Procedure Code) from suing in respect of the portion so omitted, though his right in respect of such portion may not be extinguished. I fancy that the result will be the same even if the suit so dismissed or withdrawn or portion omitted is by a mortgagor or mortgagee as the case may be. Certainly the result must *a fortiori* be the same if a decree has been given and thus not only has the original cause of action gone, but the decree also operates as *res judicata* in respect of the right adjudged.

In regard to a mortgagee's title in default of redemption by the mortgagor, the obtaining of an order for foreclosure absolute or of an order dismissing the mortgagor's suit for redemption (which has the effect of an order for foreclosure absolute) is necessary to perfect his title as owner [see Dan. Ch. Pract. (6th edition) p. 1405; *Press v. Coke*, 6 Ch. Ap. 645]. Under the English law such an order operates as a 'conveyance on sale' and has to be stamped *ad valorem* as such (*vide* sections 54 and 57 of the

English Stamp Act, 1891, and section 6 of the English Finance Act, 1898). In *Wills v. Luff* [L. R. 38 Ch. D. 197], *Chitty, J.*, says that after the passing of an order for foreclosure absolute, 'the action is at an end with the exception of the settlement of a conveyance by the judge if the parties differ.' Such a conveyance is exempt from the payment of *ad valorem* stamp duty (proviso b to section 6 of the English Finance Act, 1898) if such duty had been paid upon the decree or order for foreclosure absolute. A release by the mortgagor after judgment of foreclosure is equivalent to an absolute foreclosure by order (*Reynolds v. Perkins*, Ambl. 565) and no order of foreclosure absolute need be obtained. Under the Transfer of Property Act the order of foreclosure absolute passed in execution of the decree operates judicially as an extinguishment of the right of redemption and as a transfer of property in execution of decree or order of a Court [Sec. 2 (d) of the Transfer of Property Act] and the title of the mortgagee as owner is thus perfected and completed. The effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial title to the mortgaged land, for the first time, in the mortgagee (*Heath v. Pugh*, (C. A.), 6 Q. B. D., p. 345 at pp. 359—61; (S. C.), on appeal to the House of Lords L. R., 7 A. C. 235). Under the English Chancery Practice, even after order of foreclosure absolute, the foreclosure can be re-opened on good and sufficient cause [*Ford v. Wastell*, 2 Ph. 591; *Wills v. Luff*, 38 Ch. D. 197 at p. 200; Dan. Ch. Pract. (6th edition, p. 1406).]

I shall now proceed to consider some decisions of the other High Courts bearing upon the question now under consideration. In *Chaitu v. Purum Sukh* (Agra H. C. Rep. 1867, p. 256) it was held by a Division Bench of the North-West Provinces High Court (*Morgan, C. J.*, and *Spankee, J.*) that when a decree for redemption is obtained but not executed within the prescribed period for execution, the mortgagee does not, by such omission, cease to be the mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. In *Dowbee Singh v. Jowkee Ram* (Agra High Court Rep. 1868, p. 381) it was held by a Full Bench of the same High Court (*Morgan, C. J.*, *Roberts, Pearson, Turner and Spankee, JJ.*) that when the nature of the decree is such that it could be executed, the decree-holder cannot bring

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a fresh suit, founded upon the cause of action which has already been adjudicated upon and also upon the decree the execution of which was allowed to be barred by the law of limitation. In *Sheik Goolam v. Alla Rukhee* (N. W. P. H. C. R. 1871, p. 62) a Full Bench of the same High Court (*Morgan, C. J., Ross, Turner, Spankee and Turnbull, JJ.*) following the last mentioned Full Bench decision, held that a mortgagor who had obtained a decree for possession of the mortgaged property on the ground that the mortgage has been satisfied, but allowed the execution of the decree to become barred by limitation, cannot maintain a subsequent suit based on his old title and be permitted to revert to the position which he held prior to the institution of the first suit and to ask for remedy by a fresh suit. This was followed in 1882 by a Division Bench of the same High Court (*Straight and Mahmood, JJ.*) in *Aurud Singh v. Sheo Prasad* (I. L. R., 4 A. 481) in which it was held that a mortgagor who had obtained a decree for redemption but has allowed the execution of the same to become barred by limitation cannot bring a fresh suit to redeem the same mortgage. In *Muhammad Sami-ud-din v. Mannu Lal*, (I. L. R., 11 A. 386) a Division Bench of the same High Court (*Straight and Brodhurst, JJ.*) in 1889 held that the Full Bench decision in 1871 North-West Provinces High Court Rep. p. 62 was not binding since the passing of the Transfer of Property Act and a second suit for redemption was decreed. I need hardly say that there is nothing in the Transfer of Property Act which militates against the authority of the Full Bench decision, if it was good law—as in my opinion it was—before the Transfer of Property Act. But if the decision in I. L. R., 11 A. 386 was based, as apparently it purports to be, on the ground that the former suit for redemption was premature inasmuch as, at the date of the former suit, the usufruct had not liquidated the mortgage debt, and that, therefore, the term of the usufructuary mortgage had not expired, the decision would probably be right. The same High Court (*Edge and Burkitt, JJ.*) in *David Hay v. Razi-ud-din* (I. L. R., 19 A. 202) after reviewing all the previous decisions of that Court, as well as the decisions of the High Courts of Madras and Bombay, held that a mortgagor whether under a simple or usufructuary mortgage who had obtained a decree for redemption and allowed such decree to lapse by reason of his not paying the

decretal amount within the time limited for payment by the decree, cannot subsequently bring a second suit for redemption of the mortgage in respect of which such infructuous decree had been obtained. The Full Bench decision of the same Court in 1871 was approved and followed as also the decision of the Bombay High Court in I. L. R., 13 B. 567. The decision in I. L. R., 11 A. 386 was dissented from as also the decisions of this Court in 6, 7 and 15 Madras on the ground that 'the view of the law to be found in those cases is not supported by the law as administered in such matters in England or the law as enacted in the Civil Procedure Code or the Transfer of Property Act, and that the Full Bench decision in 1871 "was not affected by the Transfer of Property Act and is in harmony with that Act and is perfectly sound law." It was further held that the allowance of a second suit for redemption would be to go contrary to the principle of section 244, Civil Procedure Code, and that the fact that a mortgagor has failed to comply with his decree for redemption within time cannot give him a fresh cause of action.

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The question was again considered by a Division Bench of the same High Court (*Strachey, C. J., and Knox, J.*) in 1899, in *Dondh Bahadur v. Tek Narain Rai* (I. L. R., 21 A. 251). In that case the simple question was whether a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 (Transfer of Property Act) but simply dismissing the suit on the ground that the mortgagor had not prior to its institution paid or tendered the mortgage money at a time authorised by the mortgage deed had the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption which was brought after tender of the whole of the mortgage money at the time appointed in the deed, between the dismissal of the first suit and the institution of the second. It was held—and if I may venture to say so rightly—that the second suit was maintainable and that the decision in I. L. R., 19 A. 386 was clearly distinguishable. The first suit having been dismissed as premature, whether rightly or wrongly; on the ground that the cause of action had not then arisen could be no bar to the subsequent suit which was brought after the cause of action had accrued according to the decision in the former suit. The Chief Justice, however, proceeded to refer to

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the conflict of decisions between the case in I. L. R., 19 A. and the Full Bench decision of 1871 on the one hand and that in I. L. R., 11 A. and the decisions of the Madras High Court and a decision of the Calcutta High Court in 22 W. R. 172, on the other and observed that the proposition of law as enunciated in I. L. R., 19 A. cannot be regarded as 'absolutely settled law.'

Turning now to the decisions of the Bombay High Court, the case of *Gan Savant Bal Savant v. Narayan Dhond Savant* (I. L. R., 7 B. 467) is exactly in point; and in fact it is stronger than the present case inasmuch as there the decree which was pleaded in bar of the second suit did not direct foreclosure. *West, J.*, in concurring with *Kemball, J.*, that a decree for redemption, on default of the decree-holder to pay the money declared to be due within the time fixed by the decree or if none be fixed within the time allowed by the law for execution of the decree operates as judgment of foreclosure and debars the mortgagor from afterwards bringing a second suit to redeem the property, observes as follows:—"It follows then from the leading principle of *res judicata* that the same matter shall not be agitated again on the original ground so as to imperil the stability of the decision formerly given. 'Where there is *res judicata*, the original cause of action is gone and can only be restored by getting rid of the *res judicata*.' The existence of a decree in plaintiff's favour may seem not to be a good reason for depriving him of a right to sue and under the Roman law the plea of *res judicata* could be met by a replication of '*res secundum se judicata*.' Under the English law also, a judgment, it is said, is a bar only when it has negatived the right—per *Bramwell, L. J.*, in *Poyser v. Minors* (7 Q. B. D. at p. 338); but this holds generally only when the cause of action in the second suit has arisen on the same original right at a different time from the first, or the first action went off on a mere technical defect. Under the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, not by another suit—*Kisan Nandram v. Anandram Bachaji*; (10 B. H. C. R. 433) *Fakirappa v. Pandurangappa* (I. L. R. 6 B. 7). A new suit cannot be brought either on the original cause of action or, save in special cases, on the decree in which that cause had become merged. The object of the Legislature has been to prevent continued litigation on the same grounds, and this would obviously be

defeated by allowing a decree-holder to obtain from putting his decree in force and proceed again on the same cause as before." *Pinhey, J.*, who dissented from the majority, based his dissent on another point, *i. e.*, that the plaintiff in the second suit could not be regarded as having been represented by the plaintiff in the first suit. The next case in the same Court is *Maluji v. Sagoji* (I. L. R., 13 B. 567). This is a very instructive case and here the principle of *res judicata* as a bar to the second suit was carried further than is necessary in the present case. The first suit was brought as one for redemption, and the decree therein did not provide for payment of the mortgage-debt within a fixed time, nor for foreclosure or sale in case of default. The second suit was brought by the mortgagee for sale and pending that suit and before the execution of the decree in the former suit was barred by limitation, the mortgagor paid into Court the sum directed to be paid by the redemption decree. But the mortgagee refused to accept payment and insisted upon his right of sale in the subsequent suit which he brought as plaintiff. It was held that as no time was fixed for payment in the redemption decree, the mortgagor had three years within which to execute the decree and as he had paid the money within three years he was entitled to recover the property. It was further held that the suit brought by the mortgagee for sale was barred by the decree in the redemption suit under explanation II of section 13, Civil Procedure Code, inasmuch as the mortgagee might and ought to have, as defendant in the first suit, obtained a provision in the redemption decree for sale in default of payment.

The Transfer of Property Act was not in force in Bombay when either of the above decisions was passed. Whether or not the decision that the subsequent suit for sale which was brought by the defendant in the former suit was barred by the decree in the first suit is strictly warranted by section 13 (explanation II) of the Civil Procedure Code, it is certainly in conformity with section 67 of the Transfer of Property Act which provides that a mortgagee can bring a suit for foreclosure or sale only before a decree has been made for redemption of the mortgaged property. It is, therefore, of the highest importance that decrees in mortgage suits should be complete not only so far as the rights of the plaintiff are concerned, but also in so far as the rights of the defendant are

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concerned; and the fact that the decree is imperfect will not enable the defendant to enforce his rights under the mortgage, as plaintiff in a suit subsequently to be brought by him, if such rights could have been enforced by him in the former suit and provided for in the decree passed therein.

In *Siva Prasad v. Nandoo Lal* (I. L. R., 18 C., 139) it was contended that until an order absolute for sale (therein referred to as decree absolute) was made, the right to redeem existed and that the suit should be regarded as a suit to redeem. In overruling this contention *Macpherson, J.*, observed as follows:—"Even if there is no order absolute the decree *nisi* directing the sale is in existence, and if the right to redeem be still alive it cannot be enforced by a separate suit."

There are two decisions of the Privy Council which have been referred to in the course of argument and which I shall now notice: The first is *Hari Raji Chiplunkar v. Shapurji Hormasji Shet* (I. L. R., 10 B., 461). In that case a suit for redemption was brought by the representative of the mortgagors, basing the same on a decree for redemption passed in favour of the mortgagors, as defendants, in a former suit brought by the mortgagees to enforce the mortgage. The decree in the former suit was made in accordance with the award of arbitrators to the effect that the defendants therein were to pay in all Rs. 2,396 to the then plaintiffs on a day to be fixed, redeeming the mortgaged land which till payment was to remain in the possession of the mortgagees—the plaintiffs in the first suit. But no date was in fact fixed. It was held both by the High Court and by the Privy Council on appeal that the right of the mortgagor—the plaintiff—was a right to execute the above decree as defendant therein, subject to the law of limitation and not a right to sue as for the redemption of the mortgage and obtain a decree for redemption and possession in a fresh suit based on the former decree. Their Lordships of the Privy Council, adverting to a contention raised by the appellant's counsel that the mortgagor could fall back upon the right to redeem the original mortgage, observed as follows:—"The difficulty in the way of the appellant availing himself of that is that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806 * * * but treated

the decree as the mortgage which he sought to redeem, and sup-
 posing that he could, according to the decision of the High
 Court of Madras which was cited (I. L. R., 7 M. 423) fall back
 upon the mortgage of 1806, in their Lordships' opinion he is not at
 liberty to do that upon the present appeal. It would be making
 a different case from that which he made in the lower Courts and
 on which the case has been tried and decided."

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With all respect, I entirely fail to see how, as observed by
Shephard, J., in I. L. R., 19 M. 40 at p. 51, this can be regarded as
 giving a 'qualified support' to the decisions of this Court in 6, 7, 8
 and 15 Madras. The above decision of the Privy Council was
 also referred to in I. L. R., 21 M. 18 at p. 24 and I. L. R., 19 A.
 at p. 205 and regarded as expressing neither approval nor dis-
 approval of the decision of this Court in I. L. R., 7 M. 423,
 which alone was cited before the Privy Council. The other
 Privy Council decision is that in *Papamma Rao v. Pratapa
 Ramachandra Razu*, I. L. R., 19 M. 249. In that case, the
 condition of the mortgage was 'if the debt is not discharged ac-
 cording to instalments, you (mortgagee) should recover the same
 by means of the mortgaged property, the crops of our cultivation
 and from our other property and from our person according to
 your wish.' The first suit was brought by the mortgagee, as plain-
 tiff, for a decree directing the defendants (mortgagors) to pay the
 amount then due with subsequent interest 'by means of the under-
 mentioned property and other property.' The decree in the first
 suit was in these terms :—"In accordance with the custom prevail-
 ing in the Court in this Presidency, three months' time will be
 allowed to the defendants within which to pay up the whole sum
 now decreed, principal, interest and costs, failing which the plain-
 tiff shall be put in possession of the immoveable and moveable
 property specified in the bond sued upon and in the plaint and
 schedule, as provided in the terms of the bond." The mort-
 gagor subsequently brought a suit for an account, alleging that the
 whole mortgage debt has been discharged by the rents and profits
 received by the mortgagees and that the mortgagors were entitled
 to restitution of the property. The mortgagees resisted the suit
 by contending that the decree in the former suit operated as a fore-
 closure of the mortgage and that the village had become absolutely

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their property in virtue of that decree. Their Lordships held that the decree was not according to law, but not having been set right either by way of review or on appeal was binding on the parties and that there being nothing in the judgment to suggest a foreclosure any more than usufructuary possession, the mortgagee—who was originally a simple mortgagee—must be regarded as having become, under the decrees, mortgagee in possession and as such he must submit to be redeemed. The principle of this decision is that the former decree has been fully executed by the mortgagee recovering possession of the mortgaged property from the mortgagors; but that such possession being only in his character as mortgagee is liable to be redeemed as from a usufructuary mortgagee and that can be effected only by a new suit, not in execution of the former decree. It would be just the same as if a simple mortgagee, who was entitled to get possession as usufructuary mortgagee, in default of payment on the date stipulated in the mortgage bond, brought a suit against the mortgagor for such possession and recovered the same in execution of a decree passed in such suit. He will then stand in the position of a usufructuary mortgagee and can be redeemed only by a fresh suit. Neither of the above decisions of the Privy Council can be regarded as throwing any light upon the question now under consideration.

Apart from the Duchess of Kingston's case and other leading cases expounding the general principles of *res judicata* and their application to particular cases, there is hardly any English authority bearing directly upon the particular question now under consideration. *Marshall v. Shrewsbury*, (10 Ch. Ap. 250) which was cited and relied upon on both sides, throws very little light upon the question. *James*, L. J., observed that the dismissal of a bill for redemption operates as a decree for foreclosure because the mortgagor cannot afterwards file another bill for the same purpose. He is not allowed thus to harass the mortgagee.

A mortgagor bringing a second suit for redemption can hardly arise in England unless the former suit was dismissed for want of prosecution. *Curtis v. Holcombe*, [6 L. J. (N. S.) Ch. 156, 34 R. 305] referred to by *Strachey*, C. J., in *I. L. R.* 21 A. 251 at p. 256, has no resemblance whatever to the present case. In that case, the first suit *Tenlor v. Curtis*, (Younge 610—620. 2 L. J. (N. S.) Ex. Eq.

p. 17, 34 R. R. 301) was brought by the mortgagee for foreclosure, but it was held, on the construction of the mortgage-deed, that it was a Welsh mortgage (corresponding to the usufructuary mortgage, under the Transfer of Property Act) and that, therefore, there could be no right of foreclosure and the suit was accordingly dismissed. Subsequently the mortgagor brought a suit for redemption against Holcombe, the assignee of the original mortgagee (Tenlor), and the defendant contended that as he had not been permitted to foreclose the plaintiff ought not afterwards to be allowed to redeem. The Master of Rolls overruled the contention and held that the plaintiff was entitled to redeem although the defendant had no right to foreclose, but that after having obtained a decree for redemption, if he did not redeem, he must be foreclosed of his right of redemption and the bill should stand dismissed in default of redemption. Under section 92 of the Transfer of Property Act there could be no decree for foreclosure in default of redemption of a usufructuary mortgage, but a decree for sale will be passed in case of default.

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Respondents' counsel was able to rely only upon a general statement made in Dan. Ch. Pract. p. 481, Fisher on 'Mortgages,' paragraph 1385, and Robbins on 'Mortgages,' p. 1042, that a decree for foreclosure in itself, not followed by the order of foreclosure absolute is not a good defence to an action to redeem. At p. 869, Robbins on 'Mortgages,' it is also stated that a mortgagee may after decree for redemption bring a suit for foreclosure, unless it is done merely to accumulate expenses. The authority relied upon by the said text-writers in support of these propositions is certainly very slender, if not shadowy. The latter proposition is directly opposed to section 67 of the Transfer of Property Act which provides that a mortgagee can enforce the mortgage by foreclosure only before a decree has been made for redemption of the mortgage, and I do not pause to examine the authorities cited by Robbins (*Shepherd v. Titely*, 2 Atk. 348; *Grugeon v. Gerrard*, 4Y and C. Ex. 119, 128; *Dunstan v. Paterson*, 2 P. L. 341) and the Chancery Practice obtaining at the time of those decisions and determine how far they support the proposition. The principal authority cited by the three text-writers in support of the first proposition is the case of *Sanhouse v. Earle* which in its first stage is reported in 2 Ves. (Sen)

Vedapuratti. 450 and in its later stage in Ambl. 285. The bill (filed in 1752)
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 Vallabha was for redemption and in overruling a plea in bar Hardwicke.
 Valia Raja. L. C. said that "he remembered a case of this sort, *Jones v. Ken-*
 Bhaahyam *rick*, where to a bill of redemption there was a plea of decree for
 Aiyangar, J. foreclosure in the common form with averment of non-payment of
 money, etc, but no final order for foreclosure and it was an old decree;
 but notwithstanding that Lord King allowed it. From which he
 knew there was an appeal and (though it was said at the bar to be
 compromised) he took it to be reversed, for it was apprehended to
 be wrong; as notwithstanding such plea and length of time may
 be a good defence, yet as a plea it could not stand for want of a
 final order." In dismissing the bill on the merits on another point
 (Ambl. 285) the Lord Chancellor, advertng again to *Kenrick v.*
Jones observed that there was no final order for foreclosure, and
 therefore it was insisted that the redemption was open, but it appa-
 ring that at the time of obtaining that foreclosure, it was not the
 course of the Court to have such final order the objection was over-
 ruled. The Lord Chancellor's recollection of *Kenrick v. Jones*
 (which is apparently nowhere reported) in 1752 was that the deci-
 sion of the original Court allowing the plea of decree for foreclosure
 in the common form with no final order for foreclosure as a
 valid plea to a bill for redemption must be taken to have been re-
 versed in appeal, though it was said at the bar that the appeal
 was compromised; but in 1755 he justified the decision of the lower
 Court on the ground that the decree of foreclosure in the common
 form would itself operate as a bar, as it was not the course of the
 Court at that time to have a final order of foreclosure.

The case of *Senhouse v. Earle* is not cited in Chitty's 'Equity
 Index' or Mew's 'Digest' as an authority for the proposition deduc-
 ed therefrom by the above text-writers, but for quite a different
 proposition, which was the ground on which the bill was finally
 dismissed on the merits (Ambl. 285). Whether the bill in *Senhouse*
v. Earle was an original bill or a supplemental bill in addition to
 or a continuance of or a dependency of the original bill or one
 brought for the purpose of the cross-litigation or of controvert-
 ing or of carrying a decree of Court into execution (Story's Eq.
 Pleadings, paragraphs 16 to 21) is more than I can say, nor can
 I say, having regard to the fact that the defendant in the original

bill was the plaintiff in the subsequent bill, how far the law of *res Vedapuratti*
judicata had developed at that time, about twenty years prior to ^{V.}
 the Duchess of Kingston's case. Vallabha
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In Daniell's 'Chancery Practice' the only case cited is *Senhouse* ^{Bhashyam}
v. Earle. But Fisher also cites *Quarrell v. Beckford* [1 Mad. 269 ; ^{Aiyangar, J}
 (S. C.) 13 Ves. 377] and Robbins, *Ford v. Hastell* (2 P. L. 591).
 But it is not clear whether these two cases are cited in support of
 the proposition or simply as having an indirect bearing thereon.
 In the latter case, all that was laid down was that even after the
 enrolment of the order of foreclosure absolute, the time may be
 enlarged. As far as I am able to understand the former case, it
 really has no bearing whatever upon the proposition that the fore-
 closure cannot be pleaded as a bar to an action to redeem unless
 there has been a final order of foreclosure.

The above review of the decisions directly bearing or supposed
 to bear upon the question immediately under consideration estab-
 lishes that the preponderance of case law is decidedly against the
 view taken by this Court, and that the assumption that the view is
 in conformity with the English law rests only upon the very slender
 basis of *Senhouse v. Earle*, the proposition deduced from which is
 itself opposed to the earlier unreported case of *Henrick v. Jones*
 (cited from memory and explained therein by the Lord Chancellor)
 and in particular to the fundamental doctrine of *res judicata* as long
 established under the English system of jurisprudence and recog-
 nized and acted upon since the Duchess of Kingston's case both in
 England and in India.

Benson, J.—I would answer the reference in the negative for
 the reasons stated by the learned *Chief Justice* and Sir *Bhashyam*
Aiyangar, J. whose judgments I have had the advantage of perus-
 ing.

Moore, J.—The predecessor in title of the present plaintiff
 brought in 1889 a suit to redeem a mortgage of 1858. The case
 was decided after a hearing on the merits by the Subordinate Judge,
 and his decree was confirmed on appeal by the District Judge and
 the High Court. Under this decree it was directed that on payment
 by the plaintiff into Court of a certain sum on or before a fixed
 date the defendants should deliver up to him all documents relat-

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ing to the mortgaged property and re-transfer the property to him and that if such payment was not made on or before the date fixed, the property should be sold. The plaintiff did not pay within the prescribed date, and the defendants did not apply under section 93 of the Transfer of Property Act for an order for sale. The plaintiff, after the date fixed had expired, paid the money into Court and the Subordinate Judge directed the defendants to receive it and put the plaintiff in possession of the mortgaged property. In the application for execution which the plaintiff filed requesting that the money should be received from him he gave no explanation for his delay and did not apply for an extension of the time allowed by the decree for payment. Subsequently the 31st defendant in the suit put in a petition asserting that as the plaintiff had not paid the amount entered in the decree within the time there fixed he had lost his right to execute the decree and praying therefore that re-delivery of the property might be ordered. The Subordinate Judge held that under the decision reported in *Kunara Kurup v. Govinda Kurup*, I. L. R., 16 M. 214, as long as the mortgagee abstained from obtaining an order for sale under section 93 of the Transfer of Property Act, the mortgagor's equity of redemption subsisted. He accordingly dismissed the petition. On appeal, however, the District Judge reversed the decision of the Subordinate Judge, and this appellate order was upheld by the High Court in the judgment reported in *Vallabha Valiya Raja v. Vedapuratti*, I. L. R., 19 M. 40. The result of these proceedings was that the plaintiff was ousted from possession of the mortgaged property, and he subsequently in 1897, filed the suit which has led to the present reference in which he on the same cause of action as that on which the prior suit had been based sued a second time to redeem the mortgage of 1858. The facts being as I have stated, there appears to me to be no doubt that the reference which has been made to us must be answered in the negative and that it must be held that it was not open to the plaintiff to bring the present suit. The provisions of section 13 of the Civil Procedure Code are, in my opinion, a bar to this suit and the learned counsel for the plaintiff has in his argument before us scarcely attempted to show that the questions at issue are not *res judicata*. His main argument has been that, as

the relation of mortgagor and mortgagee still subsists between the plaintiff and the defendants, it must be held that it is open to the former to bring the present suit for redemption. The following passage from the judgment of the High Court reported in *Karuthasami v. Jagannatha*, I. L. R., 8 M. 478, is relied on, "In one judgment the relation on which the mortgagor and mortgagee stood to one another was not terminated by the decree. It was intended by the decree that it should be terminated on the happening of a certain event which event has not occurred. The relation then still exists and the right to redeem is inseparable from the relation so long as it exists." There can of course be no doubt as to the correctness of the proposition of law here laid down, but it cannot be held that it therefore follows that a plaintiff who obtained a decree for redemption which he has failed to execute can bring a second suit on the same cause of action. His remedy is to execute the decree that he has already obtained, and it clearly is illogical to argue that if for any reason that decree has ceased to be executable the plaintiff can evade the bar under the provisions of section 13 of the Civil Procedure Code and bring a fresh suit. The question has not been argued before us but as far as I can judge from the record it appears that it is still open to the plaintiff to execute the decree of 1890. The only point that was decided in the judgment reported in *Vallabha Valiya Raja v. Vedipuratti*, I. L. R., 19 M. 40 was that the plaintiff having made default in payment of the mortgage money within the time fixed by the decree was not entitled to apply for execution. The decision was no doubt correct, but it does not therefore follow that the decree was incapable of execution. It was clearly open to the plaintiff to apply under the last clause of section 93 of the Transfer of Property Act for an extension of the time allowed to him for payment, and if he was able to show good cause for his application the Court would have been bound to grant him the extension of time asked for. The ruling of the Bombay High Court reported in *Nandram v. Babaji*, I. L. R., 22 B. 771, as to this matter is, in my opinion, correct and should be followed.

We should, I consider, answer the reference made to us in the negative.

[This second appeal coming on for final disposal after the

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expression of opinion of the Full Bench, the Court delivered the following]

JUDGMENT :—Following the opinion of the Full Bench in the reference made to it we must allow this appeal and hold that this suit was not maintainable. We reverse the decrees of both the lower Courts and dismiss the suit. The parties will have to pay their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

1. Periasami and others Appellants *
(*Petitioners*).

v.

1. Krishnaiyan and others .. Respondents
(*Ctrl.-ptrs*).

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Limitation Act, Ss 7 and 8, Art. 179, Sch. II—Civil Procedure Code, Ss. 231, 257, 258 and 461—Joint decree-holders—Last application for execution when some were minors and some majors—Application for execution by minors after attaining age more than 3 years after last, barred.

Section 8 has no application to joint execution creditors who are not 'Joint creditors' within the meaning of the said section.

Section 7 has application only when all the joint execution creditors are under disability at the time when the period of limitation begins to run and not when some of such joint execution creditors are majors and the others minors.

Seshan v. Rajagopala, I. L. R., 13 M. 236 and *Vijneswara v. Bapayya*, I. L. R., 16 M. 436 approved.

Surykunwar Dutt v. Arunchandra Roy, I. L. R., 28 O. 465; *Govindoram v. Tata*, I. L. R., 20 B. 388, and *Zamir Hasan v. Sunder*, I. L. R., 22 A. 199 dissented from.

The words 'Person entitled to make an application' mean 'a person entitled as of right to make an application in his own right or on his own behalf and not merely a person entitled to make an application for an order in the terms of S. 231, C. P. C., which, however, cannot be asked for as of right but which the court may be empowered to make in the exercise of its discretion. Section 231, C. P. C., has no bearing on the construction of section 7 of the Limitation Act.

The general rule laid down in col. 3 para 1 of Art. 179 of the Limitation Act prescribes the starting period of limitation for an application for execution as the date of decree. This is, however, subject to five exceptions provided in paras 2, 3, 4, 5 and 6 of the same column. Periasami v. Krishnaiyan.

Tolst Mohun Misser v. Janoky Natts Roy, I. L. R., 20 C. 714 dissented from.

It is not open to the party who seeks the benefit of S. 7 to select his own starting point without reference to the exceptions laid down in paragraphs 2, 3, 4, 5 and 6.

A joint decree which is not executable as a joint decree by reason of some of the joint-decree-holders becoming barred does not become severed so as to become executable as regards the interests of the other joint-decree-holders unless by act of parties or by operation of law the interest of one joint decree-holder devolves upon the judgment-debtor when to the extent of such severance it becomes divisible.

Where, therefore, a joint decree for money was obtained by 3 brothers when all of them were minors and the last application for execution was made when two of them had attained age and the other was still a minor, and no application was made thereafter by the major brothers, but the youngest and the other two elder brothers made the present application within 3 years of the youngest attaining majority but after 3 years from the date of the last application.

Held by the Full Bench.

That the applicant had not 3 years from the date of his majority to execute the decree which he would have had under para. 1, col. 3, Art. 179, coupled with S. 7 if there was no previous application for execution at all, that the applicant being only one of joint decree-holders could not call in aid the benefit of S. 7 of the Limitation Act which would only apply when all the decree-holders were minors at the date of the last application for execution and that execution of the decree was barred by limitation, three years having elapsed from the date of the last application.

Per Bhashyam Aiyangar, J.—Sections 7 and 8 of Act IX of 1871 had no application to the case of execution applications and though sec 7 has been modified by Act XV of 1877 so as to include execution-applications the scope of S. 8 has not been widened by the present Act. Judgment-creditors and execution-creditors (meaning respectively those whose claims are merged in a judgment and those who have obtained levy of execution) are not joint-creditors and claimants within the meaning of section 8 and therefore sec. 8 has no application to the case of joint-judgment-creditors or joint-execution-creditors.

Obiter.—Under S. 257, C. P. C., payment out of court must be made in the case of joint decree-holders to all of them. A payment to one of several joint decree-holders is not binding on the others and cannot be recorded as certified under S. 258 unless the decree-holder receiving payment has also been constituted as the agent of the others.

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Order.—Even where the joint decree-holders are members of an undivided family and one of them is the family manager, the latter is not empowered to give a discharge of the decree-debt without the concurrence of the others and is further not empowered to execute the whole decree as of right. The manager is also subject to the provisions of S. 231, C. P. C., which gives only a discretion to the court to allow any one of the joint decree-holders to execute the whole decree on sufficient cause. An order under that section will, as a general rule, be a direction to the applicant for execution to furnish security for the protection of the interests of such persons. If one of the joint decree-holders or if the sole decree-holder is a minor, his guardian or next friend will not be allowed under S. 461, C. P. C., to receive any money payable to such minor under the decree without obtaining leave of the court and without, as a general rule, furnishing security.

Appeal from the order of the District Court of Salem, dated 17th September 1900, in A. S. No. 263 of 1899, confirming the order of the District Munsif of Tripattur, dated 30th September 1899, in Execution Petition No. 278 of 1899, in O. S. No. 871 of 1891.

V. Bhashyam Aiyangar for *M. Krishnamachariar* for the appellants.

T. V. Seshagiri Aiyar for the respondent.

The Court (Mr. Justice Davies and Mr. Justice Moore) made the following

ORDER of reference to a Full Bench :—

When there are two or more joint decree-holders, and the execution of the decree is barred by limitation as against one or more of them, whether one who is not so barred owing to minority can execute the decree for the benefit of all or, if not, for his own benefit alone?

There is a conflict of opinion on the question between this Court (*Seshan v. Rajagopala*, I. L. R., 13 M. 236 and *Vigneswara v. Bapoyya*, I. L. R., 16 M. 436) and the Courts of Calcutta (*Anando Kishore Dass Bakshi v. Anando Kishore Bose*, I. L. R., 14 C 50), Bombay (*Govindram v. Tatia*, I. L. R., 20 B. 333) and Allahabad (*Zamir Hasan v. Sunder*, I. L. R., 22 A. 199) and we are inclined to think that the view taken by the other Courts is correct.

The Full Bench expressed the following.

OPINION :—The *Chief Justice* :—The question which has been referred to the Full Bench is as follows : “When there are two or

more joint-decree-holders, and the execution of the decree is barred by limitation as against one or more of them whether one who is not so barred owing to minority can execute the decree for the benefit of all or, if not, for his own benefit alone?" In other words, whether the minority of one of several joint judgment-creditors saves execution of the decree from being time-barred during the minority of the minor *plus* three years.

In the case in which the order of reference was made, the material facts and dates were as follow :—On June 30th, 1892, a joint decree was passed in favour of three brothers, who at the date of the decree, were all minors. On January 8th, 1896, the last application for execution previous to the present application was made. At this date two of the brothers had attained majority and one was a minor. On February 27th, 1899, the present application was made. The youngest brother had attained majority less than three years before the application.

The first question for determination is—Are joint execution-creditors "joint-creditors" within the meaning of section 8 of the Limitation Act?

In my opinion they are not. This view has been adopted by all the High Courts. See I. L. R., 13 M. 236; I. L. R., 14 C. 50; I. L. R., 22 A. 199; and I. L. R., 20 B. 383.

As regards section 7, I think the section only applies when all the joint execution creditors were under disability at the time the period of limitation began to run. With reference to this point the Madras decisions are in conflict with those of the other High Courts. In *Govindram v. Tatia* (I. L. R., 20 B. 383), their Lordships say, "under the provisions of section 231 of the Civil Procedure Code, the minor was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he is entitled to the benefit of section 7 of the Limitation Act, and can apply for execution within three years of attaining majority;" and they held that the reasoning in *Perry v. Jackson* (4 T. R., 579) did not touch the point inasmuch as section 7 applies to an application like the present

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one which any one of the judgment creditors may present by himself under the provisions of section 231 of the Civil Procedure Code." Now, section 231 merely empowers the court, where there is a joint decree in favour of more persons than one, to make an order, on the application for execution of one or more of the joint-decree-holders for the benefit of all, for protecting the interests of the persons who have not joined in the application if the court sees sufficient cause for allowing the decree to be executed. I do not see how a rule of procedure such as this can be prayed in aid for the purpose of construing the words "person entitled to make an application" in section 7 of the Limitation Act. It seems to me these words mean a person entitled to make an application on his own behalf, and that their meaning is not affected by the fact that by a rule of procedure the court has a discretion, in a certain case, to make an order which shall enure for the benefit of parties who have not joined in the application. The word in section 7 of the Limitation Act is 'entitled.' That means entitled as of right. The phraseology of section 231 of the code shows clearly that the order which by that section the court, in the exercise of its discretion, is empowered to make, cannot be asked for as of right. In I. L. R., 22 A. 199, the court upon this point concurred with the Bombay decision above referred to, and the Calcutta decisions *Lalit Mohun Misser v. Janoky Nath Roy*, I. L. R., 20 C. 714 and *Norendra Nath Pahari v. Bhupendra Narain Roy* I. L. R., 23 C. 374, are to the same effect.

The question has again been recently considered by the Calcutta High Court in *Surja Kumar Dutt v. Arun Chunder Roy*, I. L. R., 28 C. 465, and the learned judges re-affirm the view which had been taken by the Calcutta High Court and dissent from the Madras decisions. I have carefully considered the reasoning on which their decisions are based, and, with all deference to the learned judges of the other High Courts, I am of opinion that the cases reported, in I. L. R., 13 M. 236, and I. L. R., 16 M. 436, were, as regards the point in question, rightly decided.

There remains the question when does the period of limitation for the execution of a decree begin to run. I am unable to adopt the view taken by the learned judges in the case reported in I. L. R., 20 C. 714, that if the person entitled to execution is under a

disability at the time when any one of the starting points referred to in the third column of Article 179 commences, the operation of the Limitation Act is suspended during the continuance of the disability. It seems to me that the effect of paragraphs 2, 3, 4, 5 and 6 of the fourth column is to fix one starting point in the events referred to respectively in these paragraphs, and not to leave it open to the party who seeks the benefit of section 7 to select his own starting point. It seems to me clear that where there has been an application according to law to the proper court for execution, the period begins to run from the date of that application. The first paragraph of column 3 of Art. 179 of the Limitation Act provides the time when, in the absence of the circumstances referred to in the succeeding paragraphs of the 3rd column, the period begins to run—that is the date of the decree. Paragraph 4 of the 3rd column says expressly that where there has been an application for execution in accordance with law the period begins to run from the date of the application. This is one of the exceptions engrafted on the general rule laid down in the first paragraph.

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The facts of the present case come within the exception. I think the application made in 1896 was in accordance with law although it may have been informal, and when the application was made, all the joint decree-holders were admittedly not under disability. Explanation 1 to the 3rd column of Art. 179 states that if the decree is a joint decree in favour of more persons than one, an application by one of such persons provides a fresh starting point in favour of all, but the explanation throws no light on the question whether, if at the time the statute begins to run from the fresh starting point, some of the persons are under disability and some are not, the persons then not under disability are entitled to the benefit of section 7 of the Act.

In the present case the decree was a joint decree and it seems to me that it is no longer executable as a joint decree, and I see no reason for holding that, although it is not executable as a joint decree, it is executable *quoad* the interest of one of the decree-holders, that is, as a decree under which the interests of the joint decree holders have become severed.

Davis, J. :—I concur.

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Benson, J. :—I concur.

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Moore, J. :—I concur.

Bhashyam Aiyangar, J. :—In my judgment in appeal No. 28 of 1900 decided on the 28th August 1901 (*Ahimsa Bibi v. Abdul Kader Saheb*, I. L. R., 25 M. p. 26 at p. 28), I had to consider the application of sections 7 and 8 of the Limitation Act to a suit for an account and a share of the profits of a dissolved partnership brought by the legal representatives of a deceased partner, one of whom was a minor at the time of the death of that partner. In expressing my concurrence with the decision of this court in *Seshan v. Rajagopala* (I. L. R., 13 M. 236), in so far as it bears upon the construction of section 7 taken by itself and independently of section 8, I stated as follows :—"In cases in which the right of suit vests jointly in a plurality of persons, I am clearly of opinion that if section 7 stood by itself and section 8 had not been enacted, the protection given by section 7 will extend only to cases in which each and all of the persons jointly entitled to sue were affected by disability at the time from which the period of limitation is to be reckoned, and that if any one of them was then free from disability, the suit would be governed by the ordinary law of limitation and section 7 cannot be availed of by all or any of them for the simple reason that the cause of action is a joint one." Adverting then to section 8, I stated that though it did not expressly provide, (as the latter part of the corresponding section 8 of Act IX of 1871 did) "that in a case in which one or some alone of the persons entitled to sue were affected by disability at the time when the cause of action accrued jointly to all the persons entitled, time will not run against any of them if a complete discharge of the obligation could not be given by one or more of the persons free from disability without the concurrence of the person or persons labouring under disability," yet that was necessarily implied in the former part of the section. I then deduced the following propositions from the combined operation of sections 7 and 8 in a case in which the right of suit resides jointly in a plurality of persons :—" (a) Such suit cannot be barred in part in respect of some and not barred in part in respect of the others; (b) if any one of several joint creditors or claimants is under a disability and a full discharge could be given without his concurrence by all

or any of the other joint creditors or claimants, the suit will be governed by the ordinary law of limitation and time will run against all; (c) but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability; (d) if all were affected by disability, time will not run against any of them until all have ceased to be under disability, unless one of them, who in the meanwhile has ceased to be under disability becomes capable of giving a complete discharge without the concurrence of the others, in which latter case, time will run against all from the time when one of them has thus become capable of giving such discharge (Illustration (b) to section 8, cf. I. L. R., 14 C. 50 at p. 53.)”

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As the deceased partner was governed by the Muhammadan Law, I held that none of his legal representatives who were co-heirs was, within the meaning of section 8, competent to give a discharge which would bind the minor heir and that, therefore, the third of the above propositions, (*viz.*), (c), was applicable to the suit and that the same was, therefore, not barred by the law of limitation.

The question referred to the Full Bench in the present case involves the application of sections 7 and 8 of the Limitation Act to the execution of a decree awarding a sum of money to three brothers, members of an undivided Hindu family, who being all minors, were represented by their mother as next friend. The decree was passed on the 30th June 1892, when all the three joint decree-holders were minors. The present application for execution was made on the 27th February 1899 by all the three brothers as joint decree-holders, having all attained their majority by that time, the youngest and he alone within three years prior thereto. The last preceding application for execution was made more than three years prior to the present application, *i.e.*, on the 8th January 1896, when two of the brothers had attained majority and the youngest alone was a minor. For the purposes of this reference, I shall assume that that application was made in accordance with law.

The question referred to is whether the youngest brother can execute the decree for the benefit of all or, if not, whether he can execute it for his own benefit alone. If joint decree-holders are ‘joint-creditors’ within the meaning of section 8, it will follow,

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in my opinion, that the application of the 27th February 1899 is not obnoxious to the law of limitation, whether the same be regarded as an application for execution of the whole decree made by the youngest brother alone under section 231, C. P. C., or by all the three brothers jointly, inasmuch as no discharge of the decree could validly be given either by the senior of the major brothers or by both without the concurrence of the youngest. Section 257, C. P. C., expressly provides that all money payable under a decree, should be paid, unless otherwise directed by the decree, either (a) into the Court whose duty it is to execute the decree, or (b) out of Court to the decree-holder. I need hardly add that the expression 'decree-holder' in the singular will include also the plural, and if the decree be in favour of two or more persons as joint decree-holders, the amount should be paid to all of them (*Tarruck Chunder Bhattacharjee v. Derendronath Sanyal*, I. L. R., 9 O. 831 at p. 835), just as if the amount were paid into Court it will have to be drawn from the Court by all of them under a joint receipt. Even assuming that, as held in *Barbar Moran v. Ramanna Goundan* (I. L. R., 20 M. 461) a release by one of several joint promisees without the knowledge or concurrence of the others, will, under the Indian Law, bind such others, such a doctrine will not be applicable to the case of judgment-creditors in regard to whom the procedural law as laid down in section 257, C. P. C., will have to be strictly observed. A payment made out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted by them an agent for the purpose, in which case alone the payment can be recorded as certified under section 258, C. P. C. The mere fact that one of the joint decree-holders is the managing member of an undivided Hindu family consisting of the joint decree-holders, will not empower him to give a valid discharge of the decree debt, without the concurrence of the remaining members any more than it will empower him to execute the whole decree as of right, without the concurrence of the remaining decree-holders. Under section 231, C. P. C., any one of several joint decree-holders constituting a Hindu family, whether he be the managing member or not, may, if the Court sees sufficient cause, be allowed to execute the whole decree, and in that case the Court *should* pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application. As a general rule such order

will be a direction to the applicant for execution to furnish sufficient securities for the protection of the interests of such persons. If payment be made out of Court to a sole decree-holder or several joint decree-holders, as the case may be, such payment will, of course, be a sufficient discharge of the decree debt (*vide* section 259 (b)), and it is not the act of the Court in recording such payment as certified that operates as a discharge, as held in I. L. R., 13 M. 236 at page 240 and I. L. R., 22 A. 199 at page 203. Under section 258, C. P. C., the act of the Court simply consists in recording satisfaction if the decree-holder or decree-holders certify to the Court payment to them out of Court, or if such payment is proved by the judgment debtor adversely to the decree-holder or decree-holders, within the time prescribed by Article 173-A of the second schedule to the Limitation Act. A discharge not so recorded cannot be recognised by the Court executing the decree since, for purposes of executing the decree, such record is by statute made *indispensable evidence for proving the alleged discharge*. But payment to one or some of several joint decree-holders cannot operate as a discharge of the decree-debt, nor be recorded as certified under section 258, C. P. C., unless, of course, such person or persons were duly authorized by the others to accept such payment in entire or partial satisfaction of the decree. In the case of a sole decree-holder or one of several joint decree-holders being a minor, his next friend or guardian for the suit, whoever he may be, cannot, under section 461, C. P. C., without obtaining leave of the Court and as a general rule also furnishing security, receive any money payable under the decree solely to the minor or to him jointly with the other decree-holders.

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It has been held by all the High Courts (I. L. R., 13 M. 236; 20 B. 383; I. L. R., 14 C. 50, I. L. R., 22 A. 199) that section 8 of the Limitation Act is not applicable to execution creditors, and I fully concur in that view, though, if I understand aright the reasoning on which it is based, I must with all deference say that the reasoning does not warrant the conclusion arrived at, but would lead to the opposite conclusion. My reasons for holding that execution creditors are altogether outside the scope of section 8 are that they were so under the corresponding section 8 of Act IX of 1871, and that though the said section was altered by Act XV of 1877 in

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respect of its latter half,—which was necessarily implied in the first half by substituting in place of the latter half a provision that limitation is to commence from the time when one of several joint creditors or claimants who were all labouring under disability becomes capable of giving a discharge, thus modifying section 7—yet its scope was not extended as in the case of section 7. The corresponding section 7 in Act IX of 1871 was confined to suits only and section 8 in that Act could therefore relate only to suits. When Act XV of 1877 was passed, the scope of section 7 was enlarged by including therein ‘applications’ also, the result of which was that so far as section 7 was concerned, as in the case of suits so in the case of applications, if the person or persons entitled to make the application were at the time from which the period of limitation was to be reckoned all under disability, that application could be made within the period prescribed after all of them had ceased to be under disability. If the legislature intended to give a similar extension to the scope of section 8, the expression ‘when one of several joint-creditors or claimants is under any such disability’ may naturally be expected to have been altered into ‘when one of several joint-creditors or claimants or one of several persons jointly entitled to make an application is under any such disability.’ The absence of such or similar alteration clearly shows that execution creditors and persons entitled to make applications during the course of a suit were not brought within the purview of section 8. The reason seems to me to be obvious. Whether or not one of several joint creditors or claimants can, according to the general law or the personal law governing them, give a discharge binding upon the others—which is the criterion on which section 8 proceeds—can well apply to claims or obligations for the enforcement of which suits have to be brought; but in the case of applications which are governed by processual law, such a criterion is inapplicable inasmuch as one of several persons entitled jointly to make an application, can without the concurrence of the others, give no valid discharge binding upon all in respect of the matter of the application.

The word ‘creditor’ in its general sense denotes a person “who has a right by law to demand and recover of another a sum of money on any account whatever” (Anderson’s Dictionary of Law at p. 291), and standing by itself I doubt if it includes a ‘judgment cre-

ditor' or an 'execution creditor,' the former denoting "one whose claim has been merged into a judgment against his debtor and under which generally execution may be had," and the latter, "a creditor who has obtained a levy upon property belonging to his debtor." Periasami
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Section 8 being for the above reasons inapplicable to an application for execution presented by decree-holders, the only question which has now to be considered is, whether with reference to section 7 of the Limitation Act, the application is or is not barred under Art. 179.

The first question which presents itself upon the facts of this application is the determination of the date referred to respectively in the various clauses in column 3 opposite article 179 of the 2nd schedule from which date the period of limitation is to be reckoned. The dates referred to in clauses 2, 3, 5 and 6 are upon the facts already stated inapplicable to the present case. If it were optional with the decree-holders to elect the date referred to in clause 1, *i. e.*, the date of the decree (30th June 1892) when they were all minors, in preference to the date referred to in clause 4, *i. e.*, the date of the last preceding application (8th January 1896) when only one of them was a minor, the matter is simple enough and, according to the decisions of all the High Courts, the present application which was made within 3 years after the youngest brother attained the age of majority, will not be barred by the law of limitation. The different dates, subsequent to the date of the decree referred to in the various clauses of Article 179, as the starting point from which the period of limitation is to be reckoned being evidently intended for the benefit of the execution-creditors, I was at first inclined to the opinion that they might forego the privilege and elect the date of the decree itself, if by reason of section 7 it were in the particular case more beneficial to them to reckon the period of limitation from the date of the decree sought to be executed instead of from a later date *i. e.*, the date of the last preceding application. Such view certainly would remove the anomaly of placing a decree-holder in a worse position by reason of an application for execution having once been made on his behalf or by a joint decree-holder than if no such application has ever been made. But such view will, I find

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produce even greater anomalies in other cases. If the decree-holder or decree-holders were to have the option of choosing any of the dates referred to in the various clauses, he or they might choose the date of the original decree, when he or they were all under disability, in preference to the date of the final decree of the appellate Court (confirming the original decree) when he or one or some of them may have ceased to be under disability. The contingency that the reckoning of the period of limitation from an earlier date may, in some cases, be more favourable to execution creditors than from a later date, was most probably not in the contemplation of the legislature when Art. 179 was enacted; and after a full consideration of this question, which was not fully argued, and having regard to the relative anomalies which inevitably present themselves in either view, I have come to the conclusion that for the purposes of section 7, the time from which the period of limitation is to be reckoned, should be the latest (applicable to the case) of the various dates referred to in the clauses of Art. 179. The execution creditor or creditors can claim the benefit of section 7 only if he or they, as the case may be, were all under disability at that date. In the present case, therefore, the starting point for reckoning the period of limitation should be taken to be the date of the last preceding application, *i. e.*, 8th January 1896, assuming, of course, that that application had been made in accordance with law.

As already stated, only one of the three joint decree-holders was then under disability. Viewing the question from this standpoint, there is a direct conflict between the decisions of this Court and those of the High Courts of Calcutta, Bombay and Allahabad. In the latest case on the point *Surjikanwar Dutt v. Arunchandra Roy* (I. L. R., 28 C. 465) the *Chief Justice* of the Calcutta High Court and *Banerji, J.*, in dissenting from the decisions of this Court in I. L. R., 13 M. 236, I. L. R. 16 M. 436 and *Narayanan Nambudri v. Damodaran Nambudri*, I. L. R., 17 M. 189—in all of which it was held, following the construction placed by Lord Kenyon in *Perry v. Jackson* (4 T. R. 519), on the proviso to the statute of James I, and section 4 of 3 and 4 William IV. C. 142, that section 7 of the Indian Limitation Act applies only to cases in which either there is one decree-holder and he is a minor, or in which all the joint decree-holders are minors or labour under some other disabi-

lity—distinguish the said English statutes from section 7 of the Indian Limitation Act, by pointing out that in the former the expression is ‘of any person or persons &c.’ whereas in the latter, the expression is ‘If a person entitled to institute a suit or make any application be, &c.’ With all respect to the learned judges who took part in the above decision, I must say, the phrase ‘if a person’ in the Indian Act is, by virtue of the General Clauses Act, the same as the expression ‘if any person or persons,’ occurring in the English statute.

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This decision of the Calcutta High Court as well as a former decision of the same Court in I. L. R., 14 C. 50, and the decisions of the Bombay and Allahabad High Courts in I. L. R., 20 B. 383, and I L. R., 22 A 199, all relate to joint decree-holders, one or some of whom alone were labouring under the disability of minority at the time from which the period of limitation had to be reckoned. It was held in all these cases, that section 8 was inapplicable to the case, but that under section 7 the application made by a minor decree-holder, within three years, after he attained majority, for execution of the whole decree under section 231, C. P. C., was not barred by the law of limitation, though more than three years had elapsed since the date of the last preceding application, inasmuch as the applicant was labouring under a disability at the date of the last preceding application. The *ratio decidendi* of these decisions seems to be that by virtue of section 231, C. P. C., each one of several joint decree-holders is competent to make an application for the execution of the whole decree, that therefore even if one of them alone was a minor at the date of the decree or of the last preceding application as the case may be, he is a person entitled to make an application for the execution of the whole decree, and having been, at the time from which the period of limitation is to be reckoned, a minor, he could have the benefit of section 7, if he applies for execution of the whole decree, within three years after he attains the age of majority, though the other decree-holders would, at that time, be barred by limitation from applying for execution of the decree. With all deference I find it impossible to adopt this conclusion or the reasoning on which it is based. Section 231, C. P. C., is only a rule of procedure which enables one of several joint decree-

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No doubt as observed in I. L. R., 14 C. 50 at p. 55, the bar of limitation to the execution of a decree bars only the remedy; the right is not extinguished. But if, as therein assumed, the remedy of certain decree-holders be barred, it is difficult to see on what principle they can recover their portion of the decree amount from the decree-holder who executes the whole decree and whose remedy so to execute the decree is assumed not to be barred by the law of limitation. Under section 231, C. P. C., it is obligatory on the Court, if it sees sufficient cause to permit the execution of the whole decree on application made by one of the joint decree hold-

ers, to pass such orders as may seem necessary to protect the interests of the remaining joint decree holders. If their remedy to realize their interests under the decree has already been barred, no orders could be passed for protecting the same. Suppose the joint decree-holder who, it is assumed, could make an application for the execution of the whole decree, though it is assumed that the remaining decree-holders are barred from making such application, does not choose to apply for the execution of the decree, or chooses to apply only for a partial execution of the decree, or receive payment out of Court, have the remaining joint decree holders any remedy against him? Section 231, C. P. C., proceeds on the footing that the joint decree which is sought to be executed by any one or some of the joint decree-holders and not by all is not barred by limitation either in whole or in part, and that therefore the Court may, if it sees sufficient cause, allow the whole decree to be executed for the benefit of all on application made by only one or some of them, due provision being made for protecting the interests of the others.

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Explanation 1 to Art. 179 makes it clear that where a decree has been passed jointly in favour of more persons than one and not severally, distinguishing portions of the subject-matter payable or deliverable to each, the decree cannot be barred in part, as against some, but must be barred in whole, against all, or not at all against any. Both sections 7 and 8 of the Limitation Act proceed on the same principle. For purpose of giving a fresh starting point for reckoning the period of limitation under article 179, an application for execution made by any one of several joint decree-holders will, under explanation 1, enure to the benefit of them all.

A joint decree may, no doubt, sometimes become divisible and executable in part to the extent of such severance, when by operation of law, or by act of parties, the judgment-debtor has acquired the interest of one or some of the joint decree-holders in the decree and thus a partial satisfaction or extinguishment of the decree takes place (*Banarsi Dass v. Maharani Kuar*, I. L. R., 5 A., 27; *Kudhai v. Sheo Dayal*, I. L. R., 10 A., 570). But as no such contingency is alleged to have happened in the present case, I do not consider the decisions which were cited by the learned pleader for the respondent (*Kally Soondery Davia v. Hurriah Chun-*

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der Chowdhri, I. L. R., 6 C., 594, S. C. (P. C.) *Hurriah Chunder Chowdhri v. Kally Soonderi Davia*, I. L. R., 9 C. 482 at p. 494; *Tarruck Chunder Bhattacharjee v. Devendronath Sanyal*, I. L. R., 9 C. 831, *Sultan Moideen v. Savalay Ammal*, I. L. R., 15 M., 343, *Muthusami Aiyar v. Natesa Aiyar*, I. L. R., 18 M., 464) in support of his *alternative* contention that the decree can be executed, if at all only to the extent of the youngest brother's interest in the decree-debt, *i. e.*, an one-third share to which he would be entitled in a partition between himself and his elder brothers.

Assuming that the facts bearing upon the question referred to the Full Bench are as set forth at the beginning of this judgment and that the last preceding application for execution was made in accordance with law, my answer is that the present application for the execution of the decree, whether that be regarded as one made by all the three brothers as joint decree-holders or under section 231, C. P. C., by the youngest brother alone for the benefit of all or as one made by him for the recovery of his alleged one-third share therein, is barred by the law of limitation, but that if the last preceding application was not made in accordance with law and the starting point for reckoning the period of limitation is therefore the date of the decree, the present application, whether it be one made by all the three brothers or under section 231, C. P. C., by the youngest of them alone, is not barred by limitation either in whole or in part.

Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Moore.

Rajamannar and another ... Appellants* (1st and 3rd
Defendants).

Venkatakrishnayya and another ... Respondents (Plaintiff
and 2nd Defendant).

Venkatakrishnayya ... Appellant† (Plaintiff).

Rajamannar and others ... Respondents (Defendants).

Probate Act (V of 1881), Ss. 112, 130, Exception 1, and 136.—Limitation Act, Arts. 120 and 123—Legacy, in satisfaction of debt—Administration of estate—Prayer for administration ancillary—Executor's assent—Election to claim as debt and not as legacy—Interest on legacy. Rajamannar
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krishnayya.

A suit for recovery of a legacy is governed by Art. 123 of the Limitation Act and not by Art. 120 of the same Act, though such suit may involve administration of the estate. The prayer or claim for administration in such suit is only ancillary to the claim for recovery of legacy. Venkata-
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Rajamannar.

The provision in a will that a sum owing by the testator to another be paid will operate as a legacy in satisfaction of a debt when the same is not intended to be paid till after the testator's death and no provision is made for interest.

The title of a legatee becomes complete when one of the executors consents to the legacy, and such legatee will be entitled to sue for the legacy without being driven to an administration suit which he must do if none of the executors has assented.

Where a legatee supports a claim on the footing that the whole estate of the testator is undivided property in which the testator had no disposing power and fails, he is not debarred from claiming to recover what the testator gave him out of such estate.

A person cannot claim as legacy a sum given in satisfaction of a debt due to him if he had elected to accept money as in repayment of a debt and had so received it. But if he had not received any money, he is not debarred from recovering it as legacy.

* A. No. 119; † A. No. 125 of 1900.

Rajamannar v. Venkata-kristnayya. Interest on a legacy is claimable at 6 p. c. from the death of the testator if the legacy is given in satisfaction of a debt (*vide* Act V of 1881, S. 130, Excep. I) or if the testator has so directed (S. 136).

Venkata-kristnayya v. Rajamannar. Where therefore the plaintiff to whom the testator owed a debt claimed under a provision in a will, "my elder brother Venkatakrishnayya Garu's self-acquisition to the extent of about Rs. 10,000 is kept with me. So, that money should be given to him," and that sum was directed by a codicil of a later date to be paid immediately and in a suit for partition by another brother on the ground that the whole estate of the testator was family property which the latter had no power to dispose of, the plaintiff supported this claim, but he and his brother failed and he brought this suit for recovery of the amount due under such provision within 12 years after the death of the testator but after 6 years from such date.

Held, (1) that the provision was a legacy in satisfaction of a debt,

(2) that the conduct of the plaintiff in the partition suit in which he claimed adversely to the testator and in which the decision was adverse to him does not estop him from suing for the legacy,

(3) that the suit was not one for administration but a suit for recovery of a legacy and is governed by Art. 123 and not 120 of the Limitation Act, and

(4) that interest on the legacy was payable (at 6 p. c.) from the testator's death, the legacy being in satisfaction of a debt and the testator himself having so directed.

Appeals from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in O. S. No. 13 of 1899.

The facts of the case are as follow :—The plaintiffs Venkatakrishnayya and Venkatagopalam were brothers. The former kept with his younger brother Gopalam Rs. 10,000 of his self-acquired money. Gopalam made a will on 25th April 1887, and in it he made a provision relating to the plaintiff's money which ran thus :—"My elder brother R. S. Venkatakrishnayya Garu's self-acquisition to the extent of about Rs. 10,000 is kept with me. So, that money should be given to him." The defendants Nos. 2 and 3 were appointed executors of this will. There were several codicils to this will and the only one concerning the plaintiff, dated 25th July 1887, was to the effect that the sum to be given to plaintiff should be paid immediately in cash. Venkatagopalam, the testator, died on 14th September 1882. A sum of Rs. 6,000 was admittedly paid to plaintiff on 27th January 1897 and he brought this suit on the 9th May 1899 within 12 years of the testator's death as allowed by Art. 123 of the Limitation Act to recover the balance of Rs. 4,000 due to him together with compound interest at 6 per cent.

per annum on Rs. 10,000 from 14th September 1888 to 27th January 1899 when part payment of Rs. 6,000 was made and also compound interest at the same rate on the balance of Rs. 4,000 up till date of suit. The defendants pleaded that the sum of Rs. 4,000 was paid to the plaintiff during the life-time of the testator himself on 30th August 1887. The plaintiff's contention on this point was that this sum was paid to him on a different account. This is treated as the 2nd question in the judgment of the High Court. The defendants further pleaded that the Rs. 10,000 was not a legacy but either a loan or a deposit, that as such the suit was barred by limitation and that no interest was payable not being stipulated for. The Sub-Judge held that the sum of Rs. 4,300 was paid in discharge of the plaintiff's claim in this suit as stated by the defendant, that the transaction was a deposit but that the suit was saved by acknowledgments and that interest was to run at 9 p. c. Both parties appealed from this decree.

Rajamannar
v.
Venkata-
kristnayya.
Venkata-
kristnayya
v.
Rajamannar.

In A. 119, *P. R. Sundara Aiyar* and *P. Nagabhushanam* for appellants.

The Advocate-General (*J. P. Wallis*), *S. Swaminadhan* and *S. Srinivasa Aiyangar* for 1st respondent.

In A. 125, the Advocate-General (*J. E. P. Wallis*), *S. Swaminadhan*, *S. Srinivasa Aiyangar* and *T. T. Ramachandra Rao* for appellant.

P. R. Sundara Aiyar and *P. Nagabhushanam* for 1st and 3rd respondents.

The Court delivered the following

JUDGMENT :—[Their Lordships stated the facts as given above and continued] :—

To take the defendants' appeal first, it was contended on their behalf (1) that the Rs. 10,000 was not a legacy, but either a loan by plaintiff to the testator or a deposit repayable on demand, in either of which cases the suit was barred by limitation, (2) that as a fact the whole amount of the principal had been discharged and (3) that no interest was stipulated for. The Subordinate Judge decided on the first point that the limitation bar for the recovery of the sum as a deposit was saved by acknowledgments, on the second point in favor of the defendants and on the third point that interest to run at 9 per cent. was intended by the parties.

Rajamannar
v.
Venkata-
kristnayya.
—
Venkata-
kristnayya
v.
Rajamannar.

We are unable to agree with the Subordinate Judge on the 1st question, for, in our opinion, the bequest of Rs. 10,000 was clearly a legacy meant as a satisfaction of the indebtedness of the testator to the plaintiff for money (as he expresses it) "kept with him" by the plaintiff. The mere fact that it finds place in a will not payable to the plaintiff till the testator's death and is a round sum without any provision for interest negatives the idea that it was a direction to the executors to pay a just and lawful debt. This they would have been bound to do, apart from the will, and the testator would probably have settled the amount in his lifetime if he considered that the money deposited with him was a debt pure and simple. We take it therefore that the Rs. 10,000 was a legacy, and consequently it is unnecessary for us to discuss the question whether treating it as a deposit the plaintiff's claim was or was not barred by limitation. The appellant's Vakil then urged that the suit, if taken to be as for a legacy, was also barred inasmuch as it involved an administration of the estate, and administration suits were governed by Article 120 of the second Schedule of the Limitation Act under which the limitation is six years. We cannot accept this contention, for though it is true the plaintiff prayed for an administration, it was only ancillary to his getting his legacy. When a suit for a legacy for which 12 years is specifically allowed under Article 123 entails administration of the testator's estate, it would be unreasonable to hold that that circumstance cuts down the period of limitation to six years under an indefinite article like 120, which does not refer to an administration or any particular suit but only to suits for which no other period of limitation is provided.

It was further urged that the plaintiff had no right to sue for the legacy as such, as his title thereto was not complete for want of the executor's assent (Section 112 of the Probate and Administration Act V of 1881), and the only suit he could therefore bring was one for administration which was clearly barred, but as regards this there is indubitable proof of one executor's express assent in Exhibit F and of the other executors in Exhibit B. The last contention is that the plaintiff is estopped from claiming the legacy under the will as he has disputed the validity of the will, and has elected to take the Rs. 10,000 as a debt due to himself, and not as a legacy. What happened was that in a suit brought by a brother of the plaintiff claiming his share in the testator's estate as family

property the plaintiff supported his brother and also claimed a share. It was then decided that the property was the sole property of the deceased, and that neither plaintiff nor his brother had a right to share therein. We do not see how the plaintiffs' right to the legacy is affected thereby. Having had to bow to the decision that he had no independent right in the testator's property he now seeks that he may recover what the testator gave him out of that property. There is no estoppel. And as to the alleged election, if he had agreed to accept the money as in repayment of a debt, and had actually so received it he could not of course claim the same amount, once again as a legacy. Having, however, failed to obtain it as a debt he is entitled to get it as a legacy. We accordingly decide on the first question that the suit as brought is maintainable, and is not barred by limitation.

The second question is the subject of the cross Appeal No. 125 by the plaintiff which may now be dealt with. The Subordinate Judge found that a sum of Rs. 4,000 paid by the testator to the plaintiff on the 30th of August 1887 was a part-payment towards the Rs. 10,000 bequeathed to him. There is really nothing to support this finding. The plaintiff asserts that this sum of Rs. 4,000 was paid to him on a different account, and the onus was on defendants to prove their allegation. [Here their Lordships give their reasons for differing from the Sub-judge.] We, therefore, find that it stands at Rs. 10,000.

The third and last question as to the rate of interest is easily solved by our finding that the amount claimed is a legacy. It becomes unnecessary to decide what the parties intended as to whether there should be any interest and if so, at what rate, because the law itself lays down what rate of interest shall be allowed and from what date it is to be computed. That rate is 6 per cent. per annum, and in this case it is to be calculated from the date of death of the testator first because the legacy was in satisfaction of a debt (see Exception 1 to section 130 of the Probate and Administration Act V of 1881), and secondly because the testator so expressly directed in a codicil already referred to (see section 136 of the same Act).

The result is that the defendants' appeal (No. 119) succeeds so far as the rate of interest is concerned and the plaintiff's appeal

Rajamannar (No. 125, so far as the principal sum of Rs. 4,000 is concerned.
 v. The first defendant not being an executor will also be exonerated
 Venkata- from the decree to be passed, and the 2nd and 3rd defendants the
 kristnayya. two executors alone held liable to pay the amount adjudged out of
 Venkata- the assets of the estate.
 kristnayya
 v.
 Rajamannar.

In lieu of the amounts decreed by the Subordinate Judge there will be a decree for plaintiff for Rs. 4,000 the balance of the legacy still unpaid with interest at 6 per cent. per annum on Rs. 10,000 the whole amount of the legacy from the 14th September 1888, the date of testator's death to the 27th January 1897 when the part-payment of Rs. 6,000 was made and on the remaining Rs. 4,000 at the same rate from the 27th January 1897 to the date of this decree. The parties will receive and pay proportionate costs on the total amount now decreed in both courts. The plaintiff will get subsequent interest at six per cent. per annum on the amount of this decree from this date to date of payment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Purushottama Patnaik	...	...	...	Appellant*
				(Plaintiff).
				v.
Choitana Naiko and others	...	...	...	Respondents
				(Defts. and Repts.
				of 3rd & 4th
				to 10th Defts.)

Civil Procedure Code, S. 368—Death of defendant—Power to adjourn.

Purushottama
 Patnaik
 v.
 Chaitana
 Naiko.

A Court has no power to adjourn a suit for trial when it is shewn that one of the defendants died leaving legal representatives and the cause of action did not survive solely to the surviving defendants. The court cannot proceed further with the suit until the course prescribed in section 368, C. P. C., which is applicable to such a case, is taken (or until the time fixed by law for taking such a course has elapsed).

Second appeal from the decree of the District Court of Ganjam at Berhampore in A. S. No. 85 of 1900, presented against the decree of the Court of the District Munsif of Berhampore in O. S. No. 36 of 1899.

The facts of this case were that in the course of the suit in the District Munsif's Court the 3rd defendant died and the court

adjourned the suit to a particular day short of six months for trial. On that day it was found that the plaintiff had not taken any steps to bring in the legal representatives of the deceased 3rd defendant and the District Munsif therefore dismissed the suit. On appeal to the District Court, the District Judge confirmed the decree of the District Munsif. The plaintiff therefore preferred this second appeal.

Purushottama
Patnaik
v.
Chaitana
Naiko.

A. S. Balasubramania Aiyar for *P. R. Sundara Aiyar* for the appellant.

C. V. Krishnaswamy Aiyar for *V. Krishnaswamy Aiyar* for 3rd to 11th respondents.

The Court delivered the following

JUDGMENT :—When it was represented to the District Munsif's Court on the 6th of February 1900, that the 3rd defendant was dead, as in fact he was, the Court had no power to adjourn the suit if the cause of action did not survive against the surviving defendants alone. It is not alleged or shown that it so survived. On the contrary, it was shewn that the deceased 3rd defendant left 3 minor sons, as his legal representatives who were not already on the record. As the Court had no power to grant an adjournment, the order of dismissal of the suit passed on the adjourned date was, of course, inoperative. That order is accordingly set aside and the suit must be re-admitted under its original number in the register to be dealt with under S. 368, C. P. C. Costs in this and in the lower appellate Court will then be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Parameshri and another ... Appellants *
(Defendants).

v.

Vittappa Shanbhaga and another ... Respondents
(Plaintiffs).

Transfer of Property Act Ss. 2 (c), 10, 108 (e), 111 (g) and 117—*Permanent lease* Parameshri
—*Covenant against alienation*—*No right of entry nor condition*—*No forfeiture.*

The principles enunciated in Ss. 10 and 111 (g) of the *Transfer of Property Act* may equally be applied to cases of leases not strictly governed by the *Transfer of Property Act* (Ss. 2 (c) and 117).

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v.
Vittappa
Shanbaga.

— A covenant in a lease restraining the lessee from alienating his interest is valid, (vide S. 10, Transfer of Property Act) such a stipulation being clearly intended for the lessor's benefit. The lessor will be entitled to sue for damages for a breach of such covenant and he will also be entitled to an injunction restraining the lessee from making an assignment in breach of the same.

Waiver by the landlord of a breach in consequence of the alienation made by the lessee will not debar the landlord from taking advantage of a 2nd breach arising from a subsequent alienation made, it may be, by the original lessee's alienee.

A bare covenant in a lease restraining the lessee from transferring his interest does not operate as a forfeiture of the lease and will not entitle the landlord to evict the lessee from possession unless a right of re-entry is given in consequence of such breach or the lease is subject to a condition that on such breach, the lease shall become void.

A lessee alienating his interest in breach of a covenant not to alienate will not free himself from liability to fulfil the obligations under the lease and the alienee will not be entitled to the benefits of the contract of lease (vide S. 108 c of the Transfer Property Act) so that a landlord may even after such alienation realise, by attachment and sale of the leasehold interest, arrears of rent due by the original lessee.

Where, therefore, a permanent (mulgeni) lease was given with a stipulation that the lessee "had no right to alienate the holding to anybody in any manner, whatever" and that in the event of the lessees "not requiring the land" he would sell the improvements to the lessor at a valuation to be made by four respectable persons and that he would not sell the same to any one else, and the landlord sued to evict the defendants who were assignees from the assignees of the original lessees.

Held (1) that such a stipulation did not give a right of re-entry on the breach thereof,

(2) that the lease was not conditional on the lessee observing the stipulation and,

(3) that, therefore, there was no forfeiture of the lease so as to entitle the landlord to evict the defendants.

Second appeal from the decree of the Subordinate Judge's Court of S. Canara in A. S. No. 39 of 1899 presented against the decree of the Court of the District Munsif of Karkal in O. S. No. 185 of 1898.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellants.

C. Ramachandra Rao Saheb and *K. P. Madhava Rao* for respondents.

The Court delivered the following

JUDGMENTS:—*Bhashyam Aiyangar, J.*:—The plaintiffs (respondents) sue to evict the defendants (appellants) from the

holding mentioned in the plaint on the ground that the permanent lease (mulgeni lease), dated 24th April 1862, under which defendants' claim to hold the property, has become void by reason of its absolute assignment to them in or about 1894, by one Seshappayya, who in 1890 became the assignee of the lease from the original lessee Yellappa Setti, and that by reason of such assignments in favour of the defendants there has been a forfeiture of the lease and the plaintiffs are entitled to re-enter. It was stipulated in the counterpart of the lease, Exhibit A, that the lessee "had no right to alienate the holding to anybody in any manner whatever" and that in the event of his "not requiring the land," he would sell the improvements, which he might have made upon the holding by that time, to the lessor alone, for a price that might be fixed by four respectable persons and that he would not sell the same to any one else. The construction placed by the Subordinate Judge upon the lessee's stipulation that he will not sell the same to any other person, that it refers to the land itself and not simply to the improvements is clearly erroneous and the respondent's pleader is unable to support such a construction.

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v.
Vittappa
Shanbaga.
Bhashyam
Aiyengar,

The District Munsif held that there was no forfeiture of the lease by reason of the alienation and dismissed the plaintiffs' suit so far as it sought to recover possession of the holding. But the Subordinate Judge on appeal differed from the District Munsif and gave a decree in favour of the plaintiffs for possession of the land on the ground that it was not necessary that the right of re-entry should be provided for in express terms, and that inasmuch as under the terms of the lease, the lessee had no right to alienate and if he did not want the land, he was to sell the same to the lessor with improvements, if any, effected by him, it followed that by reason of the alienation made in favour of the defendants, "the lessor was entitled to have the sale set aside." As already stated, the Subordinate Judge misconstrued the lease in holding that the lessee agreed to sell his interest in the land to the lessor.

The result of merely setting aside the sale would only be to restore the permanent lease-hold to the defendants' assignor and that would not entitle the plaintiffs to recover possession of the holding. The Subordinate Judge must be understood to mean that the plaintiffs are entitled to set aside the lease.

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v.
Vittappa
Shanbaga.
—
Bhashyam
Aiyangar, J.

In my opinion the decision of the Subordinate Judge cannot be upheld and the decree of the District Munsif should be restored. Though the Transfer of Property Act, as such, may not be applicable to the case [section 2 (c) and 117 of the Transfer of Property Act], yet the principle of law governing the case will be found clearly enunciated in sections 10 and 111(g) of the Transfer of Property Act. Section 10 provides that in the case of a lease a condition absolutely restraining the lessee or any person claiming under him, from alienating his interest in the property is not void where such condition is for the benefit of the lessor or those claiming under him. The stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would be unreasonable to hold, following the dictum in *Nil Madhab Sikdar v. Narottam Sikdar*, I. L. R., 17 C. 826, that "the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void under the provisions of S. 10 of Act IV of 1882." The stipulation against alienation is not void but valid (*Vyankatraya v. Shivram Bhat*, I. L. R., 7 B. 256) and if the plaintiffs had sued for an injunction to restrain the defendants' assignor from making the assignment or sued for damages for breach of the stipulation, they would have been entitled to the remedy sought for [*Mohana v. Shekh Sadodin*, 7 B. H. C. R. (A. C. J.) 69; *Tamaya v. Timapa Ganpaya*, I. L. R., 7 B. 262 at p. 265; *McEacharn v. Colton*, 1902 A. C. p. 104; Foa on 'Landlord and Tenant', 2nd Ed., p. 211]. It may also be that a transfer by the lessee absolutely or by way of mortgage or sub-lease in breach of the covenant not to alienate, will be void as against the lessor and he may realize arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as if there had been no transfer by the lessee and the transfer will also be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract under section 108 (c) of the Transfer of Property Act. Assuming, therefore, that the stipulation against alienation is valid, the real question in the case is whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, in the absence of an express condition providing that on breach of the stipulation against alienation, the lessor may re-enter or the lease shall become void. The fact that the landlord waived or did not enforce the forfeiture, if any, which took place

by the first absolute assignment in 1890, would not disentitle him to enforce the forfeiture, if any, which subsequently accrued on the occasion of the 2nd assignment in 1894. But the authorities are clear that in the absence of such express condition there will be no forfeiture of the lease (I. L. R., 7 B. 262; I. L. R., 17 C. 828; *Narayan Dasappa v. Ali Saiba*, I. L. R., 18 B. 603; *Madar Saheb v. Nabawa Gujranshah*, I. L. R., 21 B. 195). Even if there is no express provision for re-entry on breach of a stipulation against alienation, yet if the lease were subject to a "condition subsequent" that by alienation the lease shall become void, the lease would become void on breach of such condition and the lessor would be entitled to re-enter. (Woodfall's 'Landlord and Tenant,' 16th Edition, pp. 192-328, 328; Foa, on 'Landlord and Tenant,' pp. 237-238; I. L. R., 21 B. 195). In the present case it is impossible to construe the lease either as reserving a right of re-entry on breach of the covenant not to alienate or as conditional on the lessee not making any alienation. The clause providing for sale of the improvements to the lessor himself and none else, when the lessee does not require the lands, is evidently intended to restrain the lessee from selling the improvements to a stranger, while surrendering the lease during the term thereof. A somewhat similar clause in the lease with reference to which the case in *Narayan Dasappa v. Ali Saiba*, I. L. R., 18 B. 603, arose, was held not to give the lessor a right of re-entry by reason of the lessee having alienated the holding (at p. 605).

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Aiyangar J.

The difference between a provision against alienation which amounts merely to a 'covenant' not to alienate—a covenant which runs with the land (1902, A. C. 104)—and one which amounts to a 'condition' which dispenses with the express right of re-entry in the event of breach is explained in Woodfall's 'Landlord and Tenant' (16th Edition pp. 192-193) and in the English cases of *Shaw*, v. *Coffin* (14 C. B. N. S. 372), *Crawley v. Price* (L. R., 10 Q. B. 302) and *Doe v. Watt* (8 B. and C. 308) cited in I. L. R., 21 B. 197.

I am, therefore, clearly of opinion that the alienation under which the defendants claim does not entitle the landlord to terminate the permanent lease and re-enter upon the land. The unreported decision of a Division Bench of this Court in S. A. No. 109 of 1879 cited in the judgment of the lower appellate Court is

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—
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Aiyangar J.

strongly relied upon by the respondents in support of their contention that though no right of re-entry is reserved in the lease, yet a breach of the covenant against alienation works a forfeiture of the lease. That decision does seem, on the face of it, to support this contention, but it is opposed to the current of decisions above referred to and the law as laid down in the Transfer of Property Act, which is in conformity with the English Law.

The second appeal must, therefore, be allowed with costs both in this and in the lower appellate Court and in modification of the decree of the lower appellate Court, so much of the decree of the District Munsif as was reversed by the lower appellate Court must be restored.

Moore, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, and Mr. Justice Benson.

Muthusami Pillai and others ... Petitioners *
(Respondents
in S. A. No.
391 of 99).

v.
Srinivasier ... Respondent
(Appellant).

Civil Procedure Code, S. 623—Review—Error of Law—Landlord and tenant—Disclaimer by tenant from year to year of landlord's title—Forfeiture.

Muthusami
Pillai
v.
Srinivasier.

An application for review of judgment may be entertained on the ground of a bare error of law.

A tenancy from year to year is not determined *ipso facto* at the end of the year in which the tenant disclaimed his landlord's title but subsists unless the landlord does something to show that he intends to put an end to the tenancy by taking advantage of the forfeiture (*vide* S. 111g of the Transfer of Property Act). A tenancy from year to year does not come to an end by effluxion of time as in the case of a tenancy for a term of years but is only determined by due notice to quit (S. 111b of the Transfer of Property Act). *Srinivasa Aiyar v. Muthusami Pillai*, I. L. R., 24 M. 246 affirmed on review.

Application under section 623 of the Civil Procedure Code, for a review of the judgment of the High Court,† dated the 29th

* C. M. P. 147 of 1901.

26th March 1902.

† Reported in I. L. R., 24 M. 246.

October 1900, in S. A. No. 391 of 1899 presented against the decree of the District Court of Trichinopoly in A. S. No. 122 of 1897. Muthusami
Pillai
v.
Srinivasier.

Suit by plaintiff to eject his tenants (petitioners). The latter pleaded that they disclaimed plaintiff's title and paid no rent for over 20 years since the disclaimer and that hence the plaintiff's suit was barred. On second appeal, the High Court held that a mere disclaimer by the tenant would not do unless the landlord elected to treat such disclaimer as a ground of forfeiture of the lease and that the suit was not therefore barred. This decision is reported in *Srinivasa Aiyar v. Muthusami Pillai*, I. L. R., 24 M. 246. This petition was put in for reviewing the above decision.

The Advocate-General (*J. P. Wallis*) for the petitioners.

A. S. Balasubramania Aiyar for *P. R. Sundara Aiyar*, for the respondent.

The Court made the following

ORDER:—This is an application for review of judgment. A preliminary objection was taken that, since the ground of the application is that the judgment was wrong in law, we have no jurisdiction to entertain it. In our opinion we have jurisdiction, and we overrule the preliminary objection. The defendants were tenants of the plaintiff from year to year under a written instrument. The Advocate-General contended that the defendants' tenancy being a tenancy from year to year, and the defendants having repudiated their landlord's title in 1871 their tenancy came to an end at the end of that year, although nothing was done by the landlord to show that he intended to put an end to the tenancy. The Advocate-General relied on certain observations made by Sir *S. Subramania Aiyar*, in the course of his judgment in *Ittappen v. Manavikrama*, I. L. R., 21 M. 153, with reference to the operation of the law of limitation in the case of repudiation by a tenant of his landlord's title. After dealing with the question generally, the learned judge said "the same observations apply to the case of a tenant from year to year who denies his landlord's title." The Advocate-General argued that the learned judge intended to lay down as a proposition of law that a tenancy from year to year was *ipso facto* determined by a disavowal of the

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landlord's title at the end of the year of the tenancy during which the disavowal was made. We are by no means satisfied that the learned judge intended to lay down any such proposition, and, if he did, the proposition was in the nature of an *obiter dictum*. The proposition seems inconsistent with the express words of section 111 (g) of the Transfer of Property Act, "A lease of immoveable property determines by forfeiture in case the lessee renounces his character as such...by claiming title in himself and the lessor... does some act showing his intention to determine the lease (as has been pointed out, however, the Act does not apply to the lease in this case). A tenant from year to year is defined in Woodfall's 'Landlord and Tenant,' Edition 16, page 230, as "one who holds under a demise (express or implied) for a term which may be determined at the end of the first or any subsequent year of the tenancy either by the landlord or by the tenant, by a regular notice to quit." A tenancy from year to year does not, like a tenancy for a definite term of years, come to an end by effluxion of time. It does not come to an end except "on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other." [Transfer of Property Act, S. 111(b)].

The Advocate-General relied upon an observation of *Pattison, J.* in *Tomkins v. Lawrence*, 8 C. & P. 729, to the effect that a tenancy from year to year is considered as re-commencing every year. The question in that case was whether an allegation of a tenancy in a given year was proved where the yearly tenancy had begun some years earlier. It is obvious the learned judge did not use the word "re-commence" in the sense that a tenancy from year to year re-commenced each year because it came to an end each year. The fact that the law requires a notice to quit shows that it does not come to an end each year.

We see no grounds for reviewing our judgment.

This application must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Sreeramulu ... Appellant*
(Plaintiff).

v.

Kristamma and others ... Respondents
(Defendants).

*Limitation Act, Arts. 140, 141 and 142—Hindu Law—Widow with power to adopt—Sreeramulu
Alienation by widow for no necessity subsequent to adoption—Adopted son's v.
right—Rights of alienee. Kristamma.*

An adopted son does not claim through or by right of the widow adopting him with respect to any of her husband's property improperly alienated by her prior to adoption and the period of limitation for a suit by the adopted son to recover such property will not be calculated from the date of the alienation but only from the date of adoption.

Though the widow represents fully the estate of her husband, she does not represent it for purposes of limitation and limitation does not run against the reversioners during her lifetime. An alienation made by the widow succeeding to her husband's estate with a power to adopt is valid and binding upon the adopted son (or the reversioner) if made for justifiable necessity, but, if not made for any such purpose, will not be binding on the reversioners and much less on the adopted son.

An adopted son divesting the estate of his adoptive mother is not entitled to recover from the alienee immediate possession of property improperly alienated to the latter by the adoptive mother before adoption and the alienee, has a good title to remain in possession until the period of her natural life or until remarriage.

An adopted son is only entitled to succeed to the inheritance as it exists at the time of adoption and when the adoption is made by the widow after the husband's death, the adopted son's rights do not relate back to the date of his adoptive father's death.

A widow has an absolute right to the fullest beneficial interest in her husband's property for her life and until adoption has a personal right therein which she can transfer, of her free-will and pleasure so as to enure for her life.

Second appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 462 of 1899 presented against the decree of the Court of the District Munsif of Guntur in O. S. No. 432 of 1895.

P. B. Sundara Aiyar, for the appellant.

Joseph Satya Nadar, for 9th and 10th respondents.

Sreeramulu
v.
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The Court delivered the following

JUDGMENTS :—*Bhashyam Aiyangar, J.*:—It is found that the plaintiff was adopted in 1887 by the 1st defendant in pursuance of authority given to her by her husband who died prior to 1878. The lands mentioned in the plaint were sold in March 1879, during the minority of the 1st defendant, by her guardian and father, to the 8th defendant. This suit was instituted in 1895 (September), more than three years after plaintiff had attained his age of majority, to eject the 8th defendant and those claiming under him and recover possession of the lands on the ground that the alienation thereof was not made for purposes which will bind the inheritance in the hands of the reversionary heirs of the 1st defendant's husband. The District Judge dismissed the plaintiff's suit as barred by limitation, either under article 142 or 144 on the ground that the period of limitation should be reckoned from the date of the alienation, *i. e.*, 1879, and not from the date of the plaintiff's adoption, 1887, and that within the definition of the word "plaintiff" in section 3 of the Limitation Act, 1877, the plaintiff in the present case, notwithstanding that he claims the lands as the heir of his adoptive father, should be regarded as one who derives his right to sue from or through his adoptive mother, the first defendant.

The 1st defendant, after attaining the age of majority, did not repudiate the alienation made by her guardian and the case has been argued before us on the footing that the alienation of 1879 should be regarded as one made by the 1st defendant herself. The learned pleader for the appellant contends that the suit is not barred by limitation, as it has been instituted within 12 years from the date of the plaintiff's adoption and the District Judge is wrong in his view that the plaintiff should be regarded as deriving his right to sue from or through his adoptive mother, the 1st defendant. The learned pleader was also required to argue on what principle he maintained that the plaintiff was entitled to eject the vendee during the lifetime of the 1st defendant.

Regarding the alienation in question, as one made by a widow who had authority from her husband to make an adoption, which authority was exercised and the adoption made only subsequent to the alienation, I am of opinion, that, if the plaintiff were entitled to maintain this suit during the lifetime of the widow, the period of

limitation should be computed only from the date of the plaintiff's adoption and not from the date of the alienation, but that the vendee, having prior to the plaintiff's adoption acquired under the alienation in question an estate in the land during the lifetime of the widow, the adoption of the plaintiff cannot divest him of that estate and that consequently this suit is not maintainable during her lifetime.

The plaintiff claims to recover possession of the land as the legal representative of his adoptive father and he, therefore, derived his right to sue from or through his father and he cannot be regarded as deriving such right from or through the 1st defendant merely by reason that his status as the adopted son and legal representative of the deceased father is the immediate result of her action in adopting him, which act of hers, however, would have been inefficacious but for the authority conferred on her by the husband. Though the inheritance is fully vested in a widow as the legal representative of her deceased husband, yet it has been definitely established by judicial decisions (*Srinath Kur v. Prosunno Kumar Ghose*, I. L. R., 9 C. 934 ; and other cases, * *sic*) with reference to Article 141 of the Indian Limitation Act, 1877, and the corresponding Article 142 of Act IX of 1871, that in the case of her making an alienation of her husband's property or even of her being dispossessed by a trespasser, she does not represent the inheritance for purposes of limitation and that limitation does not begin to run during her lifetime, against any reversionary heir of her husband. The case of a son adopted by the widow is not specifically provided for in the Limitation Act as are those covered by Articles 140 and 141 of the Limitation Act, 1877. It will be straining the language of Article 140 to include the adopted son in the term " reversioner " occurring therein. That term applies only to a donor or his representative to whom the remainder of an estate reverts, such remainder not having been disposed of by the donor. The case of an adopted son claiming during the lifetime of the widow falls, therefore, under Article 144 and possession can be adverse to him only from the date of adoption. If the widow does not represent the inheritance for purposes of limitation as against the reversionary heirs of her husband, it will be unreasonable to hold that it would be otherwise as against a son adopted by her, when he claims under his adoptive father.

* Vide *Runchordas v. Parvatibai*, I. L. R., 28 I. A. 71, for the latest pronouncement on the subject by the highest judicial tribunal.—*Ed.*

Sreeramulu v. Kristamma. Bhashyam Aiyangar J. I concur in the decision of the Bonilay High Court in *Moro Narayan Joshi v. Balaji Raghunath* (I. L. R., 19 B. 809) so far as it bears on the question of limitation arising in this case and differing from the District Judge hold that the suit is not barred by the law of limitation.

The other question which has now to be considered is really one of first impression and presents greater difficulty. In the few reported cases in which a son adopted by a widow brought a suit during her lifetime to set aside alienations made by her prior to the adoption, the decision proceeded on the assumption that he would be entitled to recover possession of the property alienated, unless the alienation was made for a purpose which would be binding upon a reversionary heir. In all the cases in which the alienation was set aside at the instance of the adopted son, the decision proceeded only on the ground that the widow exceeded her lawful power in making the alienation. In none of them was the question distinctly raised and considered, whether the vendee would not in any event be entitled to retain possession during her lifetime as the widow of her deceased husband.

The solution of the question mainly depends upon the nature of a widow's estate under the Hindu Law and the rights of a son adopted by the widow, in his adoptive father's property. According to the Hindu Law a widow who succeeds to the property of her husband does not take merely a life-estate therein; the whole estate is for the time being vested in her and she represents the inheritance for many purposes. She holds an estate of inheritance to herself and the heirs of her husband, but she has only a qualified and restricted power of disposition over the inheritance. This is fully recognized by judicial decisions (*Moniram Kolita v. Kerry Kolutany*, L. R. 7 I. A. 115 at p. 154) and unless an alienation made by her is for a necessary purpose according to the standard of Hindu Law, it will not bind the reversionary heirs, or, in their absence, even the Crown. (*The Collector of Masulipatam v. Cavalry Vencatana-rainapah*, 8 M. I. A. 529). The texts of Hindu Law, however, do not deal with a widow's power of alienation of her husband's estate at her will and pleasure, for the term of her life or for any shorter period but she is enjoined by those texts to restrain her personal expenditure within the modest limits which were considered

suitable to her bereaved condition. But it has now long been established by judicial decisions that a Hindu widow has an absolute right to the fullest beneficial interest in her husband's property for her life and that she has a personal right therein, which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life, (*Kamavadhani Venkata Subbaiya v. Joysa Narasingappa*, 3 M. H. C. R. 116; *Gobinda Mani Dasi v. Sham Lal Bysak*, Beng. Law Rep., Full Bench rulings, page 48. See also L. R. 7 I. A. at p. 146 and *Mussumat Bebea Sahodra v. Roy Jung Bahadur*, L. R. 8 I. A. 210 at p. 214) or speaking more accurately, for the term of her widowhood [*Murugayi v. Virumakali*, I. L. R., 1 M. 226; *Koduthi v. Madu*, I. L. R., 7 M. 321; *Matungini Gupta v. Ram Rutton Roy*, I. L. R., 19 C. 289; *Rasul Jehan Begum v. Ram Surun Singh*, I. L. R., 22 C. 589; *Vithu v. Govinda*, I. L. R., 22 B. 321; and Act XV of 1854]. If prior to adoption, she makes an alienation for a necessary purpose, it is undoubtedly binding on the adopted son; the adoption will not divest the alienee and the adopted son will succeed only to the remaining portion of his adoptive father's property. But if the alienation had been made not for a necessary purpose, it will undoubtedly be valid during the term of her widowhood. But would an adoption subsequent to the alienation divest the alienee of even this limited estate? Though the inheritance is fully vested in the widow, yet by operation of law she is divested of the same by her adopting a son to her deceased husband and the inheritance thenceforth vests in the adopted son. (*Dhurm Das Pandey v. Mussumat Shama Soon-dri Dibiah*, 3 M. I. A. 229 at p. 242). But if a portion of the inheritance has been lawfully severed therefrom and transferred to a stranger, whether absolutely, as would be the case if the alienation was for a necessary purpose or only during the term of her widowhood, as would be the case if the alienation was not for a necessary purpose, the adopted son could on principle succeed only to the remaining inheritance which was vested in the widow at the time of the adoption. In the former case, the remaining property will be the estate left by the adoptive father *minus for ever*, the portion alienated; in the latter case, the portion alienated will not be severed permanently from the inheritance but only *temporarily*, during the term of her widowhood, and the remainder

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in such portion of the inheritance, will at the moment of adoption vest in the adopted son as a vested remainder, to fall into possession on the death of the widow or the termination of her widowhood. The same principle regulates the rights of a son adopted by the father himself. By the mere act of adoption, the adopted son becomes a joint owner with the father in respect of all ancestral property then possessed by the latter. If, prior to the adoption the father had alienated, either permanently or for the term of his life or of his wife's life any portion of the ancestral property the son becomes a joint owner only in respect of the remaining ancestral property. When the alienation was only for a term, the son becomes joint owner with the father, so far as such property is concerned, in the reversionary interest therein. The only difference in the case of an adoption by a widow is that the adopted son becomes *sole* owner, and not joint owner with the widow, of the inheritance, as it then vests in the widow. If, prior to the adoption, a portion of the inheritance had been alienated for a necessary purpose, or the widow, in exercise of her absolute personal right, carved out of such portion, in favour of a stranger, an estate for the term of her widowhood, the adopted son can succeed to the inheritance, only as it exists at the time of the adoption. In the former case, it is undoubted that the adoption cannot have the effect of divesting the alienee and it is difficult to see on what principle the adoption can operate so as to divest the alienee in the latter case. The learned pleader for the appellant contends that the adoption must be taken to relate back to the date of the adoptive father's death, and that the rights of such adopted son will be those of a posthumous son. If such were the position of a son adopted by the widow, the widow could have no personal right of enjoyment or of disposition over her husband's estate and the inheritance cannot be regarded as vested in her even until the adoption. Her powers will only be those of a guardian of a minor in existence or in the womb and in fact she will be accountable to the adopted son for the income derived from the estate until the adoption. It is impossible to maintain this position, and it was virtually exploded long ago in an elaborate judgment of the Sadar Court of Bengal, which was appealed against and adopted in its entirety by the Privy Council and which has ever since been considered as having settled the question (*Bamundoss Mookerjee v.*

Mussamut Tarinee, 7 M. I. A. p. 169). The whole of the authorities *Sreeramulu v. Kristamma*.
 on the point were examined in that case and the court refused to act upon the fanciful analogy of a posthumous son and laid it down that although a son when adopted, entered at once into the full rights of a natural-born son, his rights could not relate back to any earlier period. Till he was adopted it might happen that he never would be adopted and when he was adopted his fictitious birth into the new family could not be antedated (Mayne's Hindu Law and Usage, 6th edition, para 197; West and Buhler pp. 1151—1152; see also *Moro Narayan Joshi v. Balaji Raghunath*, I. L. R., 19 B. 809 at pp. 814—815). The above decision of the Sadar Court of Bengal, which was adopted by the Privy Council, was acted upon by this Court in *Lakshmanu Rau v. Lakshmiammal* (I. L. R., 4 M 160) and explained as follows at pp. 164—165:—
 “The Sadar Dewany Adalat pronounced that ‘an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow and that those rights continue in force until an adoption is actually made’ and held that the property is in the widow from the date of the husband’s death until the power to adopt is exercised and that the adoption divests it from the widow and vests it in the adopted son. In the interval then between the death of her husband and the exercise of the power, the widow’s estate is neither greater nor less than it would be if she enjoyed no such power or died without making the adoption. She has the same power, no greater and no less, to deal with the estate. Such acts of hers as are authorised and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorised and in excess of her powers may be challenged by the son adopted or by any other successor to the estate. * * * * *
 * * *. The decision of the Sadar Dewany Adalat is authority for holding that the widow would not have been deprived of her power by reason that she has received her husband’s consent to make an adoption.” This view was also acted upon by *Subrahmaniam Aiyar, J.* in *Ganapati Ayyan v. Savitri Ammal* (I. L. R., 21 M. 10 at pp. 16 and 17). In that case the adoptive father made a nuncupative bequest of a portion of his property for a certain charity and he also gave verbal authority to the widow to make an adoption. After holding on the authority of *Bamundoss Mookerjee v. Mussamut*

Sreeramulu v. Kristammia. Bhashyam Aiyangar J. *Tarinee*, (7 M. I. A. 169) that 'it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption,' he upheld the devise as against the adopted son on the ground that 'the title of the adopted son could not affect the right of the charity, for the latter right had vested long before the adopted son's right arose' and that his right 'must, therefore, be held to be subject to that created in favour of the charity by the oral devise.' If the title of the adopted son related back to the death of the adoptive father, as that of a posthumous son, his right by survivorship would prevail and the devise made by the father could not take effect. The devise, however, did take effect because the adopted son's right arose only from the time of the adoption and his adoption, therefore, could not divest an estate which vested in the trustee for the charity, on the adoptive father's death and prior to the adoption. An alienation of her life-interest, made by a widow prior to the adoption must stand on the same footing. The only extent to which, by analogy to the case of a posthumous son, the title of a son adopted by a widow relates back to the death of his father is that he will divest the interest of any person, in possession of the property of the father, to whom he would have had a preferable title if he had been in existence at his adoptive father's death. (*Babu Anoji v. Ratnoji*, I. L. R., 21 B. 319). A son adopted by the widow will thus divest not only the widow—or widows, if there be more than one, though the adoption was made by only one of them, (*Mondakini Dasi v. Adinath Dey*, I. L. R., 18 C. 69)—but also either in whole or in part an undivided co-parcener of the father, on whom the estate had devolved by survivorship. [*Surendra Nandan alias Gyanendra Nandan Das v. Sailaja Kant Das Mahapatra*, I. L. R., 18 C. 385; *Vithoba v. Bapu*, I. L. R., 15 B. 110; *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*, L. R., 3 I. A., 154 (S. C.) I. L. R., 1 M. 69].

The question as to how far alienations made by a male holder on whom, by survivorship, the estate of an undivided family had devolved, will bind a son subsequently adopted by a widow into the family is suggested by Mr. Mayne in para 198 of his book ('Hindu Law and Usage' 6th Edition) and he inclines to the opinion that such alienations will be absolutely binding upon the adopted son. It is unnecessary, however, to consider or decide that question in the present case.

The learned pleader for the appellant drew attention to a passage in the judgment of this Court in *Jagannadha v. Papamma*,^{Sreeramulu v. Kristamma} (I. L. R., 16 M. 400 at p. 404) in which advertng to the father's power to dispose of his property as he pleases, before adoption, it was observed that a widow with power of adoption derived from her husband had no such power of disposition over the property and therefore cannot impose any condition as to the enjoyment of the property by the adopted son. It will be noted that in this as well as in other cases, also referred to on behalf of the appellant, all that was held was that even prior to the adoption by the widow she had not an absolute or unrestricted power of disposition over her husband's estate. The question as to her limited power of disposition was not raised or decided. In the well-known case of *Moniram Kolita v. Kerry Kolitany* (L. R., 7 I. A. 115 at p. 154) in which the nature of a widow's estate under the Hindu Law and judicial decisions was fully considered by the Judicial Committee of the Privy Council and it was decided that a widow who has, once inherited the estate of her deceased husband is not liable to forfeit that estate by reason of subsequent unchastity, there is a dictum which has an important bearing on the question now under consideration. Their Lordships observe that "if the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated and the title of the heirs or her husband must accrue at that period. * * * * * If her estate were to cease by reason of her unchastity, the benefit which her deceased husband's brother and the immediate reversionary heir would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. * * * But further the widow has a right to sell or mortgage her own interest in the estate. * * * If the estate ceases by an act of unchastity the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her *prior* to the sale or mortgage" (The italics are mine). It will be noted that in this passage the Privy Council distinctly assume that, even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mort-

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gagee, from her of her own life-interest in the estate, would not be divested of it, if the sale or mortgage had taken place *prior* to her act of unchastity, but (he would be *sic*) only if it had been *subsequent* thereto. If this be sound law, it would equally hold good in the case of an alienation made by a widow, of her life estate in the property prior to her making the adoption. If, on the other hand, a son adopted by the widow were to be at liberty, during her life-time to recover possession of property alienated by her to a stranger it will follow that a reversionary heir, whose succession is accelerated by her complete withdrawal from the husband's estate, *i. e.*, by the surrender or extinction of the prior interest, namely, her life interest therein (*Behari Lal v. Madho Lal*, I. L. R., 19 C. 236 : see also *Kolandaya Sholagan v. Vedamuthu Sholagan*, I. L. R., 19 M. 337 : *Marudamuthu Nadan v. Srinivasa Pillai*, I. L. R., 21 M. 128), would be equally entitled to recover, during her life-time, property alienated by her prior to such surrender.

The rule of law deducible from judicial decisions as to the widow's absolute power of alienation of her personal interest in the husband's property and the nature of the estate transferred in exercise of such power, is, by implication, clearly stated by Article 125 of the second schedule to the Limitation Act, 1877. The suit therein referred to is one brought by a reversionary heir, during the life-time of the widow for a declaration that an alienation made by her is void, except for her life or until her re-marriage. This implies that the estate which a widow can convey in exercise of her personal right over the husband's property determines only by her death or by her re-marriage in the meanwhile, and she being lawfully entitled to carve out such an estate prior to her making the adoption, the adopted son can succeed to the property so alienated only after the determination of such estate.

If an alienation made by or on behalf of a widow is invalid against the widow herself and does not bind her, the right of action to set aside the same will at once vest in the adopted son, on the adoption, and the law of limitation applicable to any suit which he may bring during her life-time to recover possession of property so alienated will be the same as would be applicable to a suit brought for the purpose, by the widow herself without having made an adoption. A suit brought after the death of the widow

by a son adopted by her to recover possession of immoveable property alienated by her, prior to adoption, for a purpose not binding upon the adopted son, would be governed by the 12 years period of limitation prescribed by Art. 141, to be reckoned from the date of her death.

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The proposition that a son adopted by the widow cannot, before the termination of her widowhood by death or re-marriage, recover possession of any portion of his adoptive father's estate which she might have alienated prior to the adoption, is not only sound in principle but is in consonance with justice and equity. A widow, having authority from her husband,—however imperative such authority may be—is not bound to exercise the same and it is entirely optional with her to adopt or not as she may choose. Even when the alienation has in fact been made for a necessary purpose, a purchaser from the widow or his representative in interest, is, in not a few cases, unable to adduce the requisite legal evidence for discharging the *onus*, which the law casts on him, of establishing the necessity for the sale—especially when the question is raised on the death of the widow, many years after the alienation. The purchaser may know nothing of the authority given her by the husband to make an adoption and even if he is informed of the same, the widow may represent to him or lead him to believe that she will not make an adoption. Even in the absence of any authority from the husband, the widow can make an adoption at any time with the consent of her sapindas. A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her life-time, and except of course in the rare case of a re-marriage, this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation. When the widow has made an alienation prior to the adoption, the parties concerned will, before giving the boy in adoption, be fully aware of the same and of the extent of the property remaining with the widow, which will immediately come into the possession of the adopted son and the extent of property which will come into his possession, only after the life-time of the adopting widow—provided such property had not been alienated for a necessary purpose. I need hardly add, that any contrivance which, in anticipation of an adoption by her, may be made to secure to herself an estate for life in her husband's property or any consi-

Sreeramulu v. Kristamma Bhashyam Aiyangar, J. derable portion thereof exceeding what may be a reasonable provision for her maintenance, or any conveyancing device intended to secure to her directly or indirectly a beneficial interest for life in such property will be legally inefficacious against the rights of the adopted son.

The second appeal fails and the decree appealed against is affirmed except in respect of costs, but only on the ground that the suit as now brought is premature.

Under the circumstances of the case, it is ordered that each party do bear his or their own costs throughout.

Davies, J.:— I have nothing to add to my learned colleague's judgment, with which I entirely agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Major C. Bell, R. A., Superintendent, } Petitioner*
Gun Carriage Factory ... } (Accused).

vs.

The Municipal Commissioners for the City } Respondents
of Madras ... } (Complainants).

Madras Municipal Act I of 1884, Ss. 98. Cl. (9), 170, 174, 338, 341 and 420, Indian Council's Act, 1861 (24 and 25 Vict. G. 67) Ss. 22, 24, 42 and 43—Government timber imported to Madras—Duty to take out license—Crown Prerogative—Construction of taxing statutes—Acts in pari materia—History of Indian Legislation—Powers of Provincial legislatures.

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The Municipal Commissioners for the City of Madras.

Timber brought into the City of Madras by or on behalf of Government is liable to the duty prescribed by S. 341 of the Madras Municipal Act and the bringing of such timber without a license is an offence punishable under the last para of S. 341. On the true construction of the Municipal Act, S. 341 is applicable to timber imported by Government, the duty imposed by the section being an Octroi or Town duty.

The provisions for taking out a license under S. 341 of the Madras Municipal Act for importing timber are not ancillary to the provisions of S. 338 and the exemption in favor of Government in S. 338 does not apply to S. 341.

The tolls referred to in S. 174 (and in respect of which Government is exempted) are those tolls which are leviable under S. 170 of the said Act, and which are specified in Schedule D of the Act.

The Provincial Legislatures have power to make laws and regulations for the peace and good Government of the provinces within their respective jurisdictions subject to the restrictions imposed upon the Governor-General by the latter part of

* (Cr. Rev. Case No. 390 of 1901).

9th January 1902.

(Cr. Rev. Pet. No. 260 of 1901).

S. 22 of the Indian Council's Act, 1861, and subject to the restrictions imposed upon Major C. Bell the Provincial Legislatures by Ss. 40 and 43 of the same Act. Such laws are not invalid by reason of their affecting the prerogative of the Crown. The local Legislature has therefore power to impose taxation for purposes that make for the peace and good government of this Presidency, notwithstanding such tax may be payable by the Secretary of State for India in Council.

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Benson, J.

Per Benson, J.

As a general rule, the Indian Legislatures have proceeded upon the assumption that the Government will be bound by the taxing provisions of a statute unless expressly or by necessary implication excluded from its operation.

Per Bhashyam Aiyangar, J

The duty imposed by section 341 is not 'a toll' as defined in the Century Dictionary.

An Indian or colonial Legislature is not a delegate of the Imperial Legislature and though restricted in the area of its powers, is, within that area, unrestricted.

The exemption of Government from statutory duties and taxes is not really a prerogative of the Crown but depends solely upon the right construction of the statute.

Where the question is whether the Crown is bound by the provisions of Indian statutes by necessary implication though not expressly named, it is a proper rule of construction to refer to the course of Indian legislation and act or statutes *in pari materia* with the act or statute in question.

Colquhoun v. Brooks, L. R. 14 A. C. p. 493 at p. 511 followed.

Bank of England v. Vagliano Brothers, [1891] A. C. 107 at pp. 144-145, *Robinson v. Canadian Pacific Railway*, [1892] A. C. 487 and *Narendra Nath v. Kamal Basini Dasi*, L. R. 23 L. A. p. 18 at p. 26 distinguished.

According to the uniform course of Indian legislation statutes imposing duties or taxes bind Government as much as its subjects except in 2 cases:—(1) when the very nature of the duty or tax is such as to be inapplicable to Government and (2) when the Government is specially exempted.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the conviction and sentence passed by the Court of the Chief Presidency Magistrate, Egmore, Madras, in Calendar No. 85124 A of 1900
26763 of 1901.

The Advocate-General, (*J. P. Wallis*) instructed by *E. Barclay*, for petitioner.

K. Brown instructed by *D. Grant*, for the respondents.

The Court delivered the following

JUDGMENTS:—*Benson, J.*:—Major Bell, the accused in this case, is the Superintendent of the Government Gun Carriage Factory in the City of Madras. He caused certain timber to be brought into the City on account of Government without obtaining a license

Major G. Bell and paying the fees prescribed by section 341 of the City of Madras Municipal Act I of 1884, and for this act he has been prosecuted at the instance of the Municipal Commissioners and has been fined the nominal sum of one rupee.

The Municipal Commissioners for the City of Madras.

Benson, J.

The learned Advocate-General asks us, in the exercise of our powers of revision, to set aside the conviction and sentence as contrary to law. The object of the prosecution and of this revision petition is to obtain an authoritative decision of this Court as to the applicability of section 341 to Government timber and firewood. The section enacts that no timber or firewood shall be brought within the City without a license specifying the place and conditions of storing, to be issued by the President under the bye-laws, on payment of a fee which should not exceed the following rates:—"Timber Rs. 5 per ton; firewood Re. 0-6-0 per ton."

There is nothing in the section to limit the liability of Government timber, though exemptions in favour of Government are found in several other sections of the Act. The *prima facie* inference is that the Legislature intended to make the section applicable to such timber. The learned Advocate-General, however, contests this inference, and contends that the conviction is bad on three grounds, *viz.*:

1. Because the Magistrate ought to have held that the provisions of section 341 as to taking out a license for importing wood are merely ancillary to the provisions of section 338 as to taking out a license for storing wood and that the exemption in favour of Government in section 338 applies also to section 341.

2. Because, if as held by the Magistrate, the license fee leviable under section 341 is to be treated as a tax on importation it amounts to a toll, and Government property is expressly exempted by section 174 from payment of tolls.

3. Because the Crown is not bound by the taxing provisions of a statute unless there be express words to bind it, or in the absence of express words, unless the inference that it was intended to bind the Crown is manifest and irresistible, whereas on the true construction of this statute no such intention is to be found.

The first two grounds appear to me to be clearly untenable. Major C. Bell

The license mentioned in section 341 is quite distinct from that mentioned in section 338. The latter section requires the occupier of every *place* used for the sale and storage of wood and certain other inflammable materials to take out a license, just as other sections require those who keep livery stables, slaughter-houses and bake-houses, or who exercise certain dangerous and offensive trades, to take out a license, the object being to give the Municipal authorities the power to control such places in the interest of the public. Section 341, properly understood, is a section which imposes an Octroi or Town duty under the guise of a license fee. This is manifest from the heavy incidence of the fee and from the proviso in the section for a drawback of nine-tenths of the fee in case the wood is exported, and also from the fact that the President has no discretion to refuse to grant a license. A person may import wood under section 341, without taking it to a place licensed under section 338, and a person may keep a place under section 338 without importing under section 341. I can see no reason for holding that the exemption from control in section 338 in favour of a place occupied by Government wood operates to exempt from taxation under section 341 the person who imports Government wood. Nor can it, with any show of reason, be said that the exemption provided by section 174 in favour of Government as regards tolls, extends to the fee or Town duty imposed by section 341. The tolls referred to in section 174 are those tolls alone, which the Commissioners are authorised to levy *eo nomine* by section 170 and which are specified in Schedule D of the Act.

There remains the contention which was pressed upon us by the Advocate-General with much force and learning, *viz.*, that fees payable under section 341 are tolls, and that the Crown has a prerogative exemption as regards all tolls, and that, even if they are not "tolls", the Crown, or, in this country, the Secretary of State for India in Council as representing the Crown, is not bound by the taxing provisions of a statute unless there be express words to bind the Crown or in the absence of express words, unless the inference that it is intended to bind the Crown is manifest and irresistible, and that such intention is not to be found in the City of Madras Municipal Act. He contended that no intention to render the Crown liable under section 341 can properly be inferred from the

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fact that in other sections of the Act, Government is expressly exempted from liability and he quoted a number of English cases in support of his contention. There is, no doubt, abundant authority to show that in England the Crown is by virtue of its prerogative exempt from the payment of tolls, but it is also clear from the Indian Councils Act, 1861 (24 and 25, Vict. C. 67) that it is competent for the Indian Legislatures to make laws which may cut down the prerogative of the Crown in certain matters. This is clear with regard to the Governor-General in Council from section 24 which provides that "no law or regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogatives of the Crown."

I had at first some doubt whether the Governor-in-Council of this Presidency and of Bombay are competent to make any law which shall affect the prerogative of the Crown. This doubt was caused by the absence of any section similar to section 24 in regard to the powers of these local Legislatures, and it was strengthened by finding that Sir C. Ilbert in his work on the "Government of India" (pp. 223 and 226), assumed, for the same reason, that they have no such power. On further consideration, however, and after consultation with my learned colleague, I am of opinion that the local Legislatures are competent to make such a law, provided it does not affect the prerogative in regard to any matter specially exempted from their jurisdiction or from the jurisdiction of the Governor-General in Council. The authority to legislate as regards matters which affect the prerogative is not conferred on the Governor-General in Council by section 24. The authority is conferred by section 22, which gives the Governor-General in Council full legislative authority save in regard to certain specified matters, some of which affect the prerogative, and some of which do not do so. That section in substance re-enacts section 43 of 8 and 4 William IV, C. 85, with this important difference, that it omits the general words of the latter section which prohibited the Governor-General in Council from "making any laws or regulations which shall in any way affect any prerogative of the Crown." That limitation had, in the interval, been removed by section 26 of 16 and 17 Vict. C. 95, which provided that "no law or regulation made by the Governor-General in Council shall be invalid by reason only

that the same affects any prerogative of the Crown, provided," etc. Thus section 22 of the Indian Councils Act, 1861, conferred on the Governor-General in Council a general power to legislate even in matters affecting the prerogative, except in regard to certain specified matters, and section 24 was enacted *ex majore cautela* so as to show beyond all doubt that the important change in the law made, subject to a qualification, by section 26 of 16 and 17 Vict. C. 95 was, without any qualification, maintained in the New Councils Act 24 and 25, Vict. C. 67. The extent of the legislative powers of the Governor-in-Council of this Presidency and of Bombay is defined and limited in sections 42 and 43 of this Act. Under section 42, the Governor-in-Council of this Presidency may "make laws and regulations for the peace and good government" of the Presidency provided they shall not "affect any of the provisions of this Act or any other Act of Parliament in force or hereafter to be in force in such Presidency." Section 43 then specifies certain matters which are not to be dealt with by the local Legislature save with the previous sanction of the Governor-General. In neither section is there any general limitation in regard to matters affecting the prerogative. The limitations imposed on the Governor-General in Council by the latter part of section 22 must necessarily be held to apply to the subordinate Legislatures of this Presidency and of Bombay, but, subject thereto, and to the restrictions imposed by sections 42 and 43, a law passed by the Legislature of this Presidency for its "peace and good government" is not, in my opinion, invalid by reason only that it affects the prerogative of the Crown. The City of Madras Municipal Act is such a law, and even if the fees specified in section 341 thereof are to be regarded as 'tolls' to which the prerogative of the Crown would apply in England (a proposition which I think is doubtful), there would be nothing contrary to law in the local Legislature requiring such fees to be paid on Government wood in the same way as on wood, the property of private persons.

If the fees are not to be regarded as 'tolls,' with a special prerogative exemption in favour of Government still less can they be regarded as necessarily inapplicable to Government if they are, as I think they are, in reality a mere tax or Town duty, similar to the duty imposed by Act I. of 1890, (Madras) on all tobacco brought

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into the City of Madras. It would, no doubt, seem to be the case that in England, owing to historical causes, the Legislature has proceeded on the view that the Crown is not bound by a statute unless named in it, and we, therefore, find that the Crown is in many statutes expressly stated to be bound, but it is impossible to say broadly that in India the Crown is not bound by a statute, or the taxing provisions of a statute, unless expressly named in it. Such express inclusion is altogether exceptional. It would be more correct to say that, as a general rule, the Indian Legislatures have proceeded on the assumption that the Government will be bound by the statute unless expressly or by necessary implication excluded from its operation. Government, when a party to litigation, pays Court fees just as other suitors do because there is no special exemption in favour of Government in the Court Fees Act. On the other hand, Government is specially exempted from the payment of stamp duties under the General Stamp Act, 1899, section (3), proviso (i) "in cases where but for this exemption the Government would be liable to pay the duty chargeable in respect of such instrument." This amounts to a statutory declaration that Government would be liable to pay the duty but for the special exemption. In like manner, goods belonging to Government are specially exempted from duty under the Sea Customs Act and the Indian Tariff Act, and it would be easy to enumerate many other Acts in which exemptions are made in favour of Government on the evident assumption that but for such exemption the Government would be bound. Perhaps, however, the most important Act of all is the "Municipal Taxation Act, 1881" passed by the Governor-General in Council. It gives the Governor-General in Council power by an order in writing to prohibit the levy by a Municipal Committee of any specified tax payable by the Secretary of State for India in Council, but provides that in such case "the Secretary of State in Council shall be liable to pay to the Municipal Committee, in lieu of such tax," such sums (if any) as an officer appointed by Government may in all the circumstances of the case determine to be fair and reasonable. The preamble to this Act does not allege that the imposition of a tax payable by the Secretary of State to a Municipal authority is opposed to the prerogative of the Crown. It assumes that such taxation is legal. The Act, in effect, is an acknowledgment by the supreme legis-

lative authority in India that Municipal taxes may be legally and properly payable by the Secretary of State for India in Council. We have not been referred to a single local or Municipal Act in which Government or the Secretary of State is expressly named as liable to taxation. If such liability did not exist or if it depended, as the Advocate General contends that it does, on the Government being expressly named in the statute, this Municipal Taxation Act of 1881 would have had no scope for application and would have been unnecessary. The Legislature has treated such taxation as legal and proper, but has provided a special machinery for its assessment and levy, in order to guard against abuses or inconveniences that might arise if the machinery were that provided by the Acts as suitable in the case of private persons. A similar policy is embodied in the Indian Tolls (Army) Act II of 1901, and the Government Buildings Act IV of 1899. It may be noted in passing that in the former Act, Octroi or Town duties are especially excluded from the definition of 'tolls' from the payment of which the Act exempts military persons and certain military property and certain property of His Majesty. It is, in my opinion, impossible to hold that these Acts and similar exemptions in other Acts were made by the Legislature in ignorance of the prerogative rights of the Crown or merely *ex majore cautela* and without any legal necessity. The whole history and tenor of Indian legislation is opposed to the contention. It may be taken, then, that the local Legislature has power to impose taxation for purposes that make for the peace and good government of the Presidency, and that such taxation is not invalid by reason only that it is payable by the Secretary of State for India in Council. The question, then, after all comes to this, whether on the true construction of the City of Madras Municipal Act I of 1884, there is clearly manifest an intention to make section 341 applicable to wood imported by Government, and the intention is to be gathered, according to the ordinary rules of construction, from the general scope and tenor of the Act, and of the legislation in *pari materia* of which it forms a part. I am of opinion that the question must be answered in the affirmative. We find that in the City of Madras Municipal Act (V of 1878) which was in force before the Act of 1884, there were provisions for levying taxes on buildings and lands, on professions

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and salaries and on vehicles and animals, and for levying tolls on vehicles and animals entering Municipal limits. Government buildings and lands were not exempted from taxation, though the Madras Harbour Works were exempted, as were also places used for public worship and burial grounds. Besides the general tax on buildings and lands, there were special taxes leviable on buildings and lands, as a water-rate and as a lighting rate. In regard to neither was the Government generally exempt, but buildings and land in Fort Saint George, which all belong to Government, were exempt from the lighting tax, though not from the water tax. This is notable as showing that the Legislature had in mind the question of exemption of Government buildings and lands and expressly gave that exemption in part, though not generally. Military officers were not exempt from the tax on salaries, but gun carriages, ordnance carts and wagons, cavalry horses and vehicles and animals belonging to Government were exempt from the vehicle and animal taxes, and it was provided that no tolls should be paid "for the passage of troops, Government stores, Government vehicles or animals or any other Government property." Government was also exempt from the provisions of the sections which required persons exercising certain dangerous and offensive trades, keeping stables, cart-stands, etc., and places for the storage and sale of wood and other inflammable substances, to take out licenses and pay fees in respect thereof.

A section (328) corresponding to section 338 of the present City of Madras Municipal Act, existed in the Act of 1878, but it had no section corresponding to section 341. Strong objections, to a great extent sentimental, were taken by Military Officers to the payment of a profession tax under the Towns Improvements Act which was then in force in the mofussil Municipalities, and this together with certain abuses which had occurred in regard to the levy of the tax on Government buildings and lands, led the Legislature to pass Act XI of 1881, the Municipal Taxation Act already referred to, by which the Governor-General in Council was empowered to prohibit the levy of any specified Municipal tax payable (1) by Military Officers, (2) by the Secretary of State for India in Council, on certain terms as to compensating the Municipal authorities. It was after this Act was passed that the present City of Madras Municipal Act, 1884, was passed, and in it we find section

341 introduced for the first time. No exemption in favour of Major C. Bell Government is made in this section. The effect of this section is ^{V.} to impose an Octroi or Town duty on timber and firewood brought into the City. Six years later a similar duty was imposed by Act 1 of 1890 (Madras) on all tobacco brought into the City, and again we find no exemption in favour of Government. Looking to the precise manner in which the Government is exempted from payment of certain taxes and fees and to the absence of any such exemption in the case of other taxes and fees, it seems to me that the clear intention of the Legislature was to give exemption in the cases specified, and not to give exemptions in cases not specified. The omission of any exemption in the case of Town duties appears to be intelligible enough, and to be in accordance with the general policy of the Supreme Indian Legislature as indicated by the Municipal Taxation Act, 1881. Under this Act, Government has the power to prohibit the levy of the tax if it sees fit to do so; but to hold that the Legislature when enacting the City of Madras Municipal Act, 1884, did not mean to make section 341 applicable to Government, would, in my judgment, be opposed to the manifest intention of the Act, when construed in its natural sense according to accepted canons of interpretation applicable to Indian statutes, and with reference to the course of Legislation in India and the Acts which have from time to time been passed *in pari materia*.

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In this view the conviction was right and the Revision Petition must be dismissed.

Bhashyam Aiyangar, J.—The petitioner is the Superintendent of the Gun Carriage Factory at Madras, and in his official capacity caused to be brought within the City of Madras on the 7th November 1900 and the 4th February 1901, 21 logs of timber of the aggregate weight of 14½ tons without obtaining a license from the Municipality of Madras, on payment of the fee prescribed by section 341 of Madras Act I of 1884. It is admitted that the timber so brought was the property of Government and was required for the purpose of building gun carriages for His Majesty's forces, and that if the same were liable to duty under section 341, such duty will have to be paid out of the Public Indian Revenue.

The petitioner, having been convicted and fined by the Chief Presidency Magistrate for having brought the timber into the City

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without obtaining a license from the Municipality of Madras, this Revision Petition has been preferred for the purpose of determining whether the license prescribed by section 341 is necessary in the case of timber brought into the City of Madras by Government. The legality of the conviction of the petitioner is questioned solely on the ground that he was not bound to obtain the license prescribed by section 341, and it is the only question that has been argued. The learned Advocate-General, who appears for the petitioner, bases his contention on three grounds:—

- i. that section 341 is merely ancillary to section 338 and that the exemption in favour of Government in the latter is therefore equally applicable to the former ;
- ii. that the exemption from payment of tolls made by section 174 in favour of Government is applicable to the license fee prescribed by section 341, such fee amounting in fact to a toll ; and
- iii. that the Crown is not bound by the taxing provision of a statute unless there be express words to bind it or unless the inference that it was intended to bind the Crown is manifest and irresistible, whereas on the true construction of Madras Act I of 1884 no such intention is anywhere to be found.

The first two grounds are clearly untenable and present no difficulty. Section 338 enjoins that yearly licenses should be obtained in respect of every place set apart for the sale or storage (for other than private use) of timber or firewood, etc., by the occupier of such place. The fee and the rate of fee for the issue of such licenses are to be fixed by the Commissioners with the sanction of the Governor-in-Council under section 420, and, “ the President may as he in his discretion and under such restrictions and regulations as he thinks fit, grant or refuse such license.” The proviso to section 338, exempts from the operation of the section any such place in the occupation or under the control of Government. This section, (338) was practically in force since 1867. But section 341 was enacted only in 1884 and is in no sense ancillary to, or dependant upon, section 338. It really imposes Octroi duties or Town duties on the importation of timber or firewood, the duty being regulated with reference to its weight. The importer is required, on payment of the

duty, to obtain a license specifying the place and conditions of storing of the timber or firewood and the President has no discretion to refuse such license. The specification, in the license, of the intended place of storing will enable the Municipal Commissioners, to find out, if the occupier of such place of storage, if it be not in the occupation or under the control of Government, has obtained the license prescribed by section 338. The primary object of section 341 is the levy of import duty and that is entirely independent of section 338. Incidentally, no doubt, provision is made in section 341 in view to check the evasion of section 338 in cases to which that section is applicable. Timber or firewood imported by Government may or may not be stored in a place in the occupation or under the control of Government. It is impossible to connect section 341 and section 338 in such a way as to justify the engrafting on the former of the exemption in favour of Government contained in the latter.

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The second ground urged proceeds upon the assumptions that the scope of section 174 is much wider than it really is and that the duty leviable under section 341 can be regarded as a 'Toll.' A reference to section 98, particularly to clause 9, shows that tolls leviable under the Act are only in respect of vehicles and animals entering the Municipal limits. Such tolls are dealt with in sections 170-173 under the heading of 'tolls on animals and vehicles entering the Municipal limits' and the rates of tolls and the vehicles and animals in respect of which tolls are leviable are specified in schedule D. A reference to the schedule shows that the rate of tolls varies according as the animals or vehicles are laden or not laden. So far as Government is concerned section 174 exempts Government vehicles or animals, Government stores or any other Government property. The exemption can only relate to tolls leviable as such under section 170 of the Act, and they are specified in Schedule D. I do not advert to the amendment of that section by the Indian Tolls (Army) Act (II of 1901) as the amendment does not affect the question under consideration. The duty leviable under section 341 is not for the passage of timber or firewood, within the meaning of section 174, but for importing the same into the City. The exemption in favour of Government in section 174, can only apply to duties leviable under the Act as 'tolls' (section 170) and cannot be extended to section 341 even if the duty prescribed by

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the latter can be regarded as a 'toll' in its general sense. In my opinion, the duty imposed by section 341 on timber or firewood imported into the City of Madras is really an Octroi duty and that it is such is made perfectly clear by the amendment of that section by Madras Act II of 1892, providing for drawback upon timber or firewood exported from Madras, in respect of which import duty has been paid.

I do not think that 'toll' even in its wide acceptation can comprise such a tax. 'Toll' is defined in the Century Dictionary as 'a tax paid or duty imposed for some use or privilege or other reasonable consideration' and this definition, I think, brings out best the meaning of the word 'toll' from a legal point of view. The learned Advocate-General relying upon the definition of 'toll' given in Sheppard's Abridgment urges that the term will include Octroi duties or Town duties on the import of goods. That definition is quoted in the argument of Counsel in *Westover v. Perkins* (2 Ellis and Ellis, pp. 61-62) and I am by no means satisfied that an Octroi duty payable by the owner of goods—and not by the buyer as stated in Sheppard's definition—falls within the definition. It seems to me that the definition quoted above from the Century Dictionary succinctly expresses the idea conveyed by the definition in Sheppard's Abridgment. I may here refer to the definition of 'tolls' given in the Indian Tolls (Army) Act II of 1901, section 2 (h) which, while more comprehensive than 'toll' referred to as such in Madras Act 1 of 1884, expressly excludes customs-duties and Octroi-duties or Town-duties on the import of goods.

The learned Advocate-General bases his contention chiefly on the third ground. The substance of his argument is that the Crown is not bound to pay the duty imposed by section 341 because Government is neither expressly nor by necessary implication included within the purview of that section; and that the express exemption of the Crown from taxes imposed under several other sections of the Act cannot legitimately lead to the necessary implication that the Crown is liable to pay taxes imposed by section 341 and certain other sections in regard to which there is no similar exemption. The question was argued on both sides with reference to certain English and Indian decisions, in some of which it was held, that the Crown was not bound because it was not expressly

named, and in others, it was bound though not expressly named. The extent to which decisions in English Courts, passed with reference to statutes of Parliament and the prerogatives of the Crown under the English Law, will be a safe guide to the interpretation of Acts passed by the Indian Legislature and the prerogatives of the Crown in India, will depend very much upon the policy and course of Indian Legislation and the powers of the Indian Legislature—especially of the Provincial Legislatures, whose competence to affect by legislation the prerogatives of the Crown is seriously doubted by Sir Courtenay Ilbert in his recent work on the “Government of India” (at pp. 223 and 226).

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It is unnecessary to advert to the powers of the Indian legislature and the course of Indian legislation prior to 3 and 4 William IV (1833) C. 85, which vested the legislative power of the Indian Government exclusively in the Governor-General in Council. Section 43 of that Act defined the powers of the Indian Legislature as follows:—

“And be it enacted that the said Governor-General in Council shall have power to make laws and regulations for repealing, amending or altering any laws or regulations whatever, now in force, or hereafter to be in force in the said territories or any part thereof and to make laws and regulations for all persons, whether British or native, foreigners or others and for all Courts of Justice whether established by His Majesty’s charters or otherwise and the jurisdictions thereof, and for all places and things whatsoever within and throughout the whole and every part of the said territories and for all servants of the said company within the dominion of princes and states in alliance with the said company; save and except that the said Governor-General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend or affect any of the provisions of this Act or any of the provisions of the Acts, for punishing mutiny and desertion of Officers and Soldiers whether in the service of His Majesty or of the said company, or any provisions of any Act hereafter to be passed in any wise affecting the said company or the said territories or the inhabitants thereof or any laws or regulations which shall in any way affect any *prerogative of the Crown*, or the authority of Parliament or the constitution or rights of the said company or any part

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of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." By section 59 of the same statute it was provided that the Provincial Governors in Council were no longer to have the power of making laws except in case of urgent necessity and then only until the decision of the Governor-General of India in Council be signified thereon. It will be noticed that by section 43 the Governor-General in Council was prohibited from making any law affecting the prerogative of the Crown. This provision, however, was modified by 16 and 17 Vic. C. 95 section 26, which provided as follows:—"No law or regulation made by the Governor-General in Council shall be invalid by reason only that the same affects any prerogative of the Crown, provided such law or regulation shall have received the previous sanction of the Crown signified under the Royal Sign Manual of Her Majesty, countersigned by the President of the Board of Commissioners for the affairs of India."

When the Indian Councils Act, 1861 (24 and 25 Vic. C. 67) was passed, section 43 of 3 and 4 William IV C. 85 and section 26 of 16 and 17 Vic., C. 95 were, among others, repealed and the legislative powers of the Provincial Governors in Council were restored. Section 22 of the Indian Councils Act defines the legislative powers of the Governor-General in Council, and it substantially corresponds to section 43 of 3 and 4 William IV C. 85, except in one important particular, i. e., that the prerogative of the Crown is not excepted from the Legislative authority of the Governor-General in Council save, of course, in so far as the matters specially excepted may comprise certain prerogatives of the Crown. Section 24 expressly provides that a law made by the Governor-General in Council shall not be deemed invalid by reason only that it affects the prerogatives of the Crown. This is simply a reproduction of the first part of section 26 of 16 and 17 Vic. C. 95 which section was repealed. This section is really superfluous and can be regarded as inserted only '*ex majore cautela*,' as an important change was made in the law by subjecting the prerogative of the Crown to the legislative authority of the Governor-

General in Council, except in so far as such prerogative may relate to the allegiance of any person to the Crown or to the sovereignty or dominion of the Crown over any part of the Indian territories—which are specially excepted by the concluding paragraph of section 22. Section 42 empowers the Provincial Governors in Council to make laws and regulations ‘for the peace and good government of the Provinces’ subject to the condition that no Act of Parliament then in force or thereafter to be in force in the Provinces is to be affected by any provincial legislation. It will be noted that the matters which may be dealt with by the Provincial Legislatures are not specifically enumerated as in the case of the Governor-General in Council, nor are the matters comprised in the last paragraph of section 22, which are excepted from the legislative authority of the Governor-General in Council, specially excepted in section 42 from that of the Provincial Governors in Council. It seems probable that it was considered unnecessary that the exceptions covered by the last paragraph of section 22, should be engrafted on section 42 in as much as section 42 empowers Provincial Governors in Council to make laws only for the ‘peace and good government’ of the Province, and that such power cannot possibly extend to any of the matters comprised in the last paragraph of section 22. Whether this is so or not, it is obvious that matters excepted from the legislative authority of the Governor-General in Council cannot be within the powers of subordinate Provincial Legislatures. It is true, as pointed out by Sir C. Ilbert that there is no section, with respect to the laws passed by Provincial Legislatures corresponding to section 24 which relates only to laws passed by the Governor-General in Council affecting the prerogative of the Crown. Does this warrant the inference drawn by Sir Courtenay Ilbert that the Provincial Legislatures do not possess the power which the Governor-General in Council has of making laws which may affect the prerogative of the Crown? If the power of the Governor-General in Council, to pass such a law was conferred by section 24, no doubt the inference would be irresistible, that in the absence of such a section the Provincial Legislature can pass no such law. The power of the Governor-General in Council to pass a law affecting the prerogative of the Crown is derived not from section 24 but from section 22 which unlike the corresponding section 43 of 3 and 4 William IV. C. 85, does

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not except the prerogative of the Crown generally from the legislative jurisdiction of the Governor-General in Council. Section 42 defining the powers of the Provincial Legislatures does not except the prerogative of the Crown generally from their jurisdiction and it can hardly be contended that there would be no need or occasion to affect any prerogative of the Crown in making effective laws and regulations for the 'peace and good government' of the province.

The phrase 'peace, order and good government' is used in several Acts of Parliament conferring legislative powers on Colonial Assemblies. The 91st section of the British North America Act, 1867, provides that it shall be lawful for the Queen, with the advice and consent of the Senate and the House of Commons, to make laws for the 'peace, order and good government' of Canada, in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces. In *Russell v. The Queen* (L. R. 7 A. C. 829) a question was raised as to the validity of the Canada Temperance Act, 1878, passed by the Dominion Parliament and it was held by the Privy Council that the Act did not come within one of the classes of subjects assigned to the Provincial Legislatures and was *intra vires* of the Dominion Parliament being of a nature which fell within the general authority of Parliament to make laws for the order and good government of Canada. In *Ashbury v. Ellis* [(1893) A. C. 339] a contention was raised that the Act of Parliament 15 and 16 Vic. C. 72 which gave to the Legislature of New Zealand power 'to make laws for the peace, order and good government of New Zealand provided that no such law be repugnant to the laws of England' did not give power to subject to its judicial tribunals persons who neither by themselves nor by their agents were present in the colony. It was argued that though the law was not repugnant to the laws of England, yet the moment an attempt was made by the Legislature of New Zealand to affect persons out of New Zealand, that moment the local limitations of the jurisdiction were exceeded and the attempt was nugatory. Their Lordships of the Privy Council overruled the objection, it being in their opinion "clear that it is for the peace, order and good government of New Zealand that the Courts in New Zealand should in any case of contracts made or to be performed in New Zealand have the power of judging whether they

will or will not proceed in the absence of the defendant" and that whether a foreign Court will or will not enforce a judgment passed in the absence of the defendant under such circumstances, it is sufficient for trying "the validity of New Zealand laws in New Zealand to say that the peace, order and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand." Though no question of prerogative being affected by the Colonial Legislature was involved in either of the above cases, they afford illustrations of the liberal interpretation which has been placed by the Judicial Committee of the Privy Council on the expression "peace, order and good government."

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In *Cushing v. Dupuy* (L.R. 5 A. C. 409) the question arose as to whether the Dominion Enactment 40 Vic. C. 41 section 28, amending the Canadian Insolvency Act providing that the judgment of the Court of Appeal in matters of insolvency should be 'final' could and did derogate from the prerogative of the Crown to allow appeals as an act of grace. Their Lordships of the Privy Council thought it unnecessary to consider and decide whether the Parliament of Canada had power to interfere, by legislation, with the royal prerogative, as in their opinion the 28th section of the Insolvency Act did not profess to touch it and that upon the general principle that the rights of the Crown can be taken away only by express words, the power of the Queen to allow appeals as an act of grace was not affected by an enactment. The attention of the Privy Council was drawn to an Act of the Parliament of Canada 31 Vic. C. 1, enacting rules of interpretation to be applied to all future legislation, when not inconsistent with the Act or the context, which, among others, provides that no provision or enactment in any Act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs, or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

An earlier decision of the Privy Council to the contrary in *Cuvillier v. Aylwin* (2 Knapp's P. C. 72) which was followed in *R. v. Eduljee Byramjee* (3 M. I. A. 468 at p. 486) and in *R. v. Alloo Paroo* (3 M. I. A. at p. 496) was virtually, if not expressly, overruled on the ground that the decision in that case "if not expressly overruled has not been followed and later decisions are opposed to it." A similar question arose before the Privy Council

Major C. Bell in 1856 in an appeal from the Sudr Dewanny Adaulat of Bombay, V. The Municipal Commissioners for the City of Madras. in *Modes Khaikooserow Hormusjee v. Cooverbhall* (6 M. I. A. 448 at p. 455) as to the operation of Act III of 1843 in barring the prerogative of the Crown from admitting appeals against an order rejecting a special appeal to the Sudr Dewanny Adaulat which order was declared 'final' by that Act. Their Lordships of the Privy Council held that the Act would have no such operation as the Indian Legislature had no power to limit or affect the prerogative of the Crown without its previous sanction and it did not appear that the said Act was passed after obtaining such sanction. It was for the same reason that Act VI of 1856 (an Act for granting exclusive privileges to Inventors) passed by the Legislative Council of India was disallowed by the Court of Directors on the advice of Her Majesty's law officers (*Vide* Preamble to Act XV of 1859) that the exclusive privilege of the Crown to grant patents for inventions was affected by the Act. The Act VI of 1856 was accordingly repealed by Act IX of 1857, but was virtually re-enacted as Act XV of 1859 after having obtained previously the sanction of Her Majesty as required by section 26 of 16 and 17 Vic., C. 95.

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The Indian Councils Act, however, removed such limitation of the powers of the Indian Legislature. In that Act itself there is internal evidence that there is no such limitation even in respect of the powers of the Provincial Legislatures, for section 43 contemplates provincial legislation, with the previous sanction of the Governor-General, for regulating coins and patents or affecting the relations of Government with foreign princes or states. A reference to sections 19 and 38 will show that both in the Governor-General's Council and in the Provincial Councils, bills may be introduced, with the previous sanction of the Governor-General or Governor as the case may be, affecting the Public Revenue of India or imposing any charge on such Revenue. I draw attention to this special provision in connection with certain English decisions to be referred to hereafter in which it was held that although there is no special exemption of the King, yet he is exempted by virtue of his prerogative from the operation of every Act imposing a duty or a tax.

It has now been definitely decided by the Judicial Committee of the Privy Council in more cases than one, both from India

and the Colonies, that an Indian or Colonial Legislature is not a delegate of the Imperial Legislature, that it is restricted in the area of its powers, but within that area it is unrestricted. In *R. v. Burah* (L.R. 3 A. C. 889) their Lordships of the Privy Council, in overruling a Full Bench decision of the Calcutta High Court, that section 9 of Act XXIII of 1869 was *ultra vires* of the Indian Legislature, laid down the general law in these terms :—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself." The same doctrine was laid down in a later case, *Hodge v. the Queen* (L. R. 9 A. C. 117) by their Lordships of the Privy Council in the following terms—"It appears to their Lordships, however, that the objections thus raised by the appellant is founded on an entire misapprehension of the true character and position of Provincial Legislatures. They are in no sense delegates of, or acting under mandates from, the Imperial Parliament. When the British North American Act enacted that there should be a Legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes, in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agent of, the Imperial Parliament but authority, as plenary and as ample, within the limits, prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and area, the local Legislature is supreme and has the same authority as the Imperial Parliament." This principle was approved of and followed in an appeal from N. South Wales in *Powell v. Apollo Candle Company* (L. R. 10 A. C. 282). The same doctrine virtually finds legislative declaration in section 45 of 3 and 4 William IV, C. 85.

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In my opinion, therefore, there can be no reasonable doubt as to the competence of Provincial Legislatures to pass laws within the area of their powers—which is narrower than the area of the powers of the Governor-General in Council—though such laws may affect

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the prerogative of the Crown. If it were otherwise, the powers of the Provincial Legislature to make laws for the peace, order and good government of the Province will be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogatives of the Crown in India and the validity of no few enactments of the Provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the royal prerogative.

But in construing the general words of an enactment it may be important to consider whether any prerogative of the Crown will be affected by a literal construction; and for the purposes of this case, it will be necessary to consider whether exemption from statutory duties and taxes is in the real sense of the expression, a 'Crown prerogative.' In the *Mayor of Lyons v. East India Company* (1 M. I. A. 175) the principle of law bearing upon the prerogatives of the Crown in India was indicated by Lord Brougham in the following terms:—"It is agreed on all hands that a foreign settlement obtained in an inhabited country by conquest or by cession from another power stands on a different relation to the present question from a settlement made by colonising, i. e., peopling an uninhabited country. In the latter case, it is said that the subjects of the Crown carry with them the laws of England, there being of course no *lex loci*. In the former case it is allowed that the law of the country continues until the Crown or the Legislature changes it (*Vide also Cooper v. Stuart*, L. R. 14 A. C. 286 at p. 291). Then, is Calcutta to be considered as an uninhabited district settled by English subjects or as an inhabited district obtained by conquest or cession? If it falls within the latter description, has the English law incapacitating aliens ever been introduced? If that law has never been introduced, has there been such an introduction of English law generally that those parts which have been introduced draw along with them the law touching aliens? An answer to these three questions * * * will include a consideration of the only reason for the proposition upon which the judgment below is mainly rested, viz., that the royal prerogative extends necessarily and immediately to all acquisitions however made and that the forfeiture of aliens' real estate is parcel of that prerogative." In considering these three

questions, their Lordships after adverting to the contention that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of the sovereign power, and pointing out with reference to the laws of various countries, that there is no warrant in the nature of the thing, for the position that this right is an incident of sovereignty, observe as follows:—"Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purpose of protecting the state and it is not contended that those branches are extended to Bengal. Mines of precious metals, treasure trove, royal fish are all vested in the Crown for the purpose of maintaining its power and enabling it to defend the State. They are not enjoyed by the sovereign in all or even in most countries and no one has said that they extend to the East Indian possessions of the British Crown." In the *Advocate-General of Bengal v. Ranees Surnamayee Dasi* (9 M. I. A. 391) Lord Kingsdown, after adverting to the introduction and establishment of the English Criminal Law in India and its application to Natives as well as Europeans with reference to the prerogatives of the Crown (pp. 428—30), to forfeiture of the personal property of persons committing suicide in Calcutta, arrived at the conclusion that the English law '*felo de se*' and forfeiture of goods and chattels did not extend to a Native Hindu though a British subject, committing suicide at Calcutta. It is unnecessary to refer to various other instances which will readily occur to one's mind, which according to the Common law of England are comprised in the Royal Prerogative, but in the very nature of things are either inapplicable to or have not been introduced into India. On the other hand, it is probably true that the Crown has, according to the Common law of India, certain prerogatives which it may exercise in India though not in England, notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The prerogatives of the Crown in India—a country in which the title of the British Crown is of a very mixed character—may vary in different provinces, as also in the Presidency towns as distinguished from the Mofussil. The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task.

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I shall now proceed to consider how far the canon of interpretation commonly stated in the form 'that the Crown is not bound by a statute unless named in it' can be safely applied to Acts of the Indian Legislature and in particular to taxing Acts. The various cases in the English reports, in which this canon of interpretation was considered and in some of which it was held that the Crown was not bound because it was not expressly named or included by necessary implication, and others in which the Crown was held bound though not so named or included will be found collected in Maxwell's "Interpretation of Statutes" (3rd edition) pp. 186-193 and Hardcastle's "Construction of Statutory Law" (2nd edition) pp. 401-421. It may not be easy to reconcile all the cases or to deduce therefrom certain definite rules of interpretation. The leading canon seems to be that laid down by Lord Coke in the *Magdalene College case*, which the Master of the Rolls states as follows in *Ex parte Post Master-General, in re Bonham* (L. R. 10 Ch. D. at p. 661):—"Where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act though not particularly named therein; but where a statute is general and any prerogative, right, title or interest is thereby divested or taken from the King, in such case the King shall not be bound unless the statute is made by express terms to extend to him." The Master of the Rolls after observing that that is the general rule and that the point came before the Court of Exchequer in *Attorney-General v. Donaldson* (10 M. and W. 117) and there Baron Alderson in delivering the judgment of the Court said 'It is a well established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect,' held that although the Crown was named in some of the sections of the Bankruptcy Act, 1869, it was not bound, by the other provisions of the Act so as to deprive it of its undoubted prerogative of 'Extent.' This is one of the cases which the learned Advocate-General relies upon. A reference to the judgment of the Master of the Rolls will show that the decision is based not only upon the general canon of interpretation, but also upon the positive conclusion he arrived at from the wording of the sections, that the Legislature intended not to deprive the Crown of its undoubted prerogative.

Adverting to the first portion of Lord Coke's rule, Maxwell Major C. Bell (at p. 193) points out that it would probably be more accurate to say that the Crown is not excluded from the operation of a statute where neither its prerogative rights nor property are in question. As regards the latter portion of the rule, judicial decisions have clearly established that the Crown is sufficiently named in a statute, within the meaning of the rule, when the intention of the Legislature to include it is clear and manifest. The canon of interpretation simply amounts to this, that it is to be presumed that the Legislature does not intend to deprive the Crown of any prerogative right, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Such a rule of interpretation is not peculiar to the Crown. It is analogous to and founded upon the principle on which, for instance, the following canons of interpretation are equally applicable to the construction of statutes—*viz*: i, it is a sound rule to construe a statute in conformity with the Common Law rather than against it, except where and so far as the statute is plainly intended to alter the course of the Common Law. (*R. v. Morris*, L. R. I. C. C. R. at p. 95); ii, it is a maxim that a statute made in the affirmative, without any negative, expressed or implied, does not take away the Common Law (Coke). iii, 'where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so'—'*generalia specialibus non derogant*' (*Seward v. Vera Cruz*, L. R. 10 A. C. 68); iv, the general rule undoubtedly is that the jurisdiction of superior Courts is not taken away except by express words or necessary implication. (*Albon v. Pyke*, 4 M. and Gr. 424) &c. These compendious canons of interpretation which are in the nature of maxims can only be regarded as mere guides to the interpretation of statutes and ought not to be applied as if they were statutory clauses, enacted with all the precision and provisos of an Interpretation Act.

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In *Theberge v. Laundry* (L. R. 2 A. C. 102) the Lord Chancellor in an appeal from the Superior Court of Quebec in Canada, while holding in that particular case that the Crown had not the

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prerogative of admitting an appeal from a judgment of the Superior Court under the "Quebec Controverted Elections Act, 1875," affirmed the general principle of construction in the following words:—"Their Lordships wish to state distinctly that they do not imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and that they would be prepared to uphold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

This emphatic statement of the rule being founded upon general principles of construction is undoubtedly applicable as much to Indian enactments as to Colonial or Imperial statutes; and if general words of an Indian enactment are such as according to their literal interpretation would divest the Crown of, or take away from it, any prerogative, right, title or interest, they would certainly have to be construed in a limited sense so as not to produce such a result which, it may be reasonable to infer, could not have been in the contemplation of the Legislature, in the absence of a clear indication of an intention to the contrary. But it is unduly stretching the language of the rule, to bring within its scope general words of a statute imposing a tax and claim exemption for the Crown on the ground that the Crown is divested of any prerogative, right, title or interest, by giving full effect to the general words.

So far as exemption from any tax imposed by a statute is concerned, the question for determination is whether according to the right construction of the statute, the Crown is or is not made liable to pay the tax. In the former case, it is bound to pay; in the latter, it is not; in neither case is there any question of prerogative. The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown. A statute imposing a tax upon Crown property—which tax will be payable out of the public revenue, cannot reasonably be regarded as divesting the Crown of any right, title or interest, within the meaning of the above rules—especially when such tax is levied for purposes connected with the good government of the country, for which purpose, such revenues are, in India vested in trust in the Crown, by section 39 of 21 and 22. Vic. Ch. 106.

In the English reports, the above canon of interpretation has often been referred to, as in *Attorney-General v. Donaldson*, as a well-established rule, according to which, generally speaking, the Crown is not included in a statute unless there be words to that effect; and the exemption of the Crown from payment of rates imposed by statutes is referred to as an implied prerogative right of the Crown. The state of the English Law on this question was fully reviewed and considered by the House of Lords in *Coomber v. Justices of Berks*, (L. R., 9 A. C. 61). I cannot do better than quote the following extracts from the judgments of Lords Blackburn, Watson and Bramwell in that case. Lord Blackburn (pp. 65—66) :—"In *Rea v. Cook*, (3 T. R. 519) the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post horses was exigible in respect of post horses carrying an express from the Governor of Portsmouth to one of His Majesty's Principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concern of this kingdom. It was held that it was not exigible. Lord Kenyon, delivering the judgment of the Court, says 'now, although there is no special exemption of the King in this Act of Parliament (25 Geo. 3. C. 51), yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43rd Eliz. and every other Act imposing a duty or tax on the subjects.' There may well be expressions in an Act imposing a duty or tax on the subjects such as to show that the intention of the Legislature was to impose the duty on some property belonging to the Crown. But I do not think it made out that there is any such intention shown in the Income-tax Act. Reliance was placed in the argument on the general words of the rule 'which rule shall be construed to extend to all lands, tenements and hereditaments or heritages capable of actual occupation of whatever nature and of whatever purpose occupied or enjoyed.' But I do not think this can be construed as taking away the exemption by virtue of the prerogative, of property actually occupied or enjoyed by the Crown.* I should rather infer that those who framed the Act thought that unless expressly named, such an occupation would have been exempted*. There had been a considerable number of decisions

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on the poor-rate, which laid down a much wider principle than that laid down in *Rea v. Cook*, namely, that whenever property was occupied for 'public purposes' it was exempted from poor-rate. In the *Mersey Docks v. Cameron*, (11 H. L. C. 443) it was decided by this House that the exemption to such an extent could not be supported. But whilst this was decided, it was not said that all the cases which established exemption on the ground indicated in *Rea v. Cook* were wrong. The passage at pp. 464, 465, in the opinion of the majority of the judges, which I delivered and which has been so often quoted, shows that those who joined in that opinion thought that many of them, such as those deciding that buildings occupied by the Post Office, the Horse Guards, or the Admiralty were exempt, were obviously right and that those which decided that buildings occupied for Police and for the Assize Courts were exempt, though not so obviously right, were capable of being supported on a ground that did not touch the case then before the House. I do not think that opinion can be properly cited as an authority that those cases were rightly decided, but certainly their authority was not weakened by anything said in that opinion. The House in *Mersey Docks v. Cameron*, did not decide that those cases to which I have referred were rightly decided; but the language of the Lord Chancellor (Lord Westbury) at p. 505, seems to me adds to their authority. He there says, that the 'public purposes' to make an exemption, must be such as are required and created by the Government of the country and are, therefore, to be deemed part of the use and service of the Crown; and in *Greig v. University of Edinburgh* (L. R. 1 H. L. Sc. 354), he more clearly shows what was his view, by using this language: 'property occupied by servants of the Crown and (according to the theory of the constitution) property occupied for the purposes of the administration of the Government of the country became exempt from liability to the poor-rate.' Lord Cranworth (11 H. L. C. 508) by using the words 'more or less sound' seems to me to guard against being supposed to decide that those cases which proceeded on this ground were all right in deciding that the purposes were those of the public Government, to such an extent as to bring them within the principle of *Rea v. Cook*, but he certainly does not at all impeach them. The Scotch

cases on the Scotch poor law proceed on a similar ground. It has been pointed out that in the Scottish poor law, half the poor-rate is imposed on the owner in respect of property, and so far the case is more closely analogous to that of the income-tax; but, I think, that whether the rate is exigible in respect of property or in respect of occupation, the ground of exemption must be the same, viz, as said by the Lord Chancellor (*Cairns*) in *Greig v. University of Edinburgh*, 'the Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statutes when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the poor' (pp. 67-69). I do not say that the Assize Courts maintained by the county for the administration of the Queen's justice in the Queen's Courts are quite so clearly occupied by the servants of the Crown, as those Courts which are maintained by the Woods and Forests, out of the general revenue of the country. Nor do I say that the Police Station maintained by the county for the maintenance of the Police is quite so clearly occupied by servants of the Crown as a barrack maintained for soldiers and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the purposes of the administration or those purposes of the Government which are, according to the theory of the constitution, administered by the Sovereign. If it was a new point whether buildings occupied for the purpose of County Courts and County Police were liable to be rated for the poor-rate, I think, there would be considerable force in the argument that the county occupying property in order to fulfil a duty to the Crown which it is required to fulfil at its own expense, is not occupying it for the Government or in the service of the Government. But as for many years property thus occupied has been uniformly held exempt from the poor-rate, I do not think your Lordships ought now to hold that it is liable to poor-rate (pp. 69-70) * * *. It seems to me that it is not material whether the assessment statute imposing any tax, does so, like the Poor-rates Acts for a local purpose, or like the statute imposing a duty on post horses, considered in *Rex v. Cook*, or the income-tax, for an imperial purpose. In each there is an implied exemption on the

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ground of prerogative. And if the property is so held as to bring it within the ground of exemption for the one statute, it must surely be brought within the ground of exemption for the other (p. 71)*. *Lord Watson*:—It was accordingly argued for the appellant that your Lordships are free in this case to consider all questions as to the proper extent and limit of Crown privilege, as if these had now arisen for the first time for decision. The statement in point of fact upon which that argument was rested is not strictly accurate, because as has been pointed out by my noble and learned friend, the Court in *Rea v. Cook* gave effect to the privilege of the Crown not in the case of a local but of a general tax holding that such privilege extended not only to the Act of Elizabeth but to every Act imposing a tax upon the subjects of the Crown. But I should have been prepared to hold apart from the authority of that case, that the appellant's contestation upon this point is untenable. The exemption of the Crown from the incidence of rating statutes is a general privilege and is no wise dependent upon the local or imperial character of the rate. It takes effect in all cases, when the Crown is not named in the statute, or I should prefer to say, in all cases where the enactments do not take away the privilege either in express terms or by plain and necessary implication. There is not, in my opinion, one kind of Crown exemption from the statute of Elizabeth and another kind of Crown exemption from the Income-tax Acts (p. 76)*. *Lord Bramwell*:—The poor-rate is local. Whatever exempts part of the property in a rated locality, adds to the burden on the rest and there is this additional hardship that the exempted part may increase the burden itself by adding to the numbers chargeable on the rate. Moreover, the reasoning on which that exemption was founded may be doubtful. But it is the law, the law as confirmed **** in this House by the reasoning in the *Mersey Docks case*. For, as I have said, there is some hardship in exempting any property from a local rate, there is none in exempting from a general tax a class of property everywhere within the range of that tax. The payers and receivers of the poor-rate are not the same. If the Crown paid income-tax, it would be at once payer and receiver. And indeed, in one view the question is unimportant. For if this kind of property pays everywhere, a less rate of income-tax will be

necessary and a greater local rate everywhere. Whereas, by our decision, more income-tax may be required and less local rate. And this is what many people think desirable" (pp. 79-80).

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It is clear from the above extracts that unless the Crown is included expressly or by necessary implication, Crown property is not liable in England to any rates or taxes. Adverting to Lord Bramwell's adverse criticism of the course of decisions as to Crown exemptions, I may mention that it is stated in *Castle's Law of Rating* (2nd Edition, 1886) at page 121, that "within the last few years attempts have been made in Parliament to carry through an Act which will remove the exemption from rateability of Government property." Lords *Kenyon* and *Blackburn* refer to the exemption of the Crown, as an implied exemption by virtue or on the ground of prerogative. It may be inferred from the observation made by Lord *Blackburn* that framers of English statutes generally proceed on the principle that unless the Crown be expressly included, it will not be bound by the statute, and whenever it is intended to bind the Crown, it is expressly named, e. g. The Arbitration Act, 1889, section 23; The Patents etc., Act, 1883, section 27; The Bankruptcy Act, 1883, section 150. The Interpretation Act, 1889, section 30., The Stamp Act, 1891, section 119.

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The reference by Lords *Kenyon* and *Blackburn* to the prerogative of the Crown as the reason for its implied exemption must be understood as referring only to the above rule of interpretation and not to any prerogative of the Crown in its real sense. Similarly, the privilege of the Crown to use an invention without compensation to the patentee, notwithstanding the grant of a patent for the exclusive right to the use of the invention and the implied exemption of the Crown from payment of tolls, notwithstanding a grant, by itself, of a right to levy tolls, are referred to as prerogatives of the Crown, though such privilege and exemption are only the result of the rule applicable to the interpretation of Crown-grants, the grant in either case being made in the exercise of one and the same branch of the royal prerogative (*Feather v. The Queen*, 35 L. J. Q. B. 200).

In the *Mayor of Weymouth v. Nugent* [VI B and S. 22, 34 L. J. (M. C.) 81] on which the learned Advocate-General specially

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relies, *Cockburn*, C. J. explained as follows, the immunity enjoyed by the Crown from payment of tolls :—"It may be said that the doctrine of the immunity enjoyed by the Crown from payment of tolls arose in times when tolls were levied by virtue of a grant from the Crown or under prescription which presumed a prior grant from the Crown and, therefore, it might well be assumed that where tolls were granted by the Crown, it was not intended by the Crown that it should itself be barred by the grant ; but whether that be the origin of the immunity or not, it has obtained from the earliest times and it cannot be supposed that the Legislature could have intended to make the Crown liable to the payment of those duties, without making any mention of the Crown at all." Both on the ground of the exemption of the Crown from payment of tolls and on the ground that the Crown is not bound by an Act of Parliament unless it is expressly named therein, it was held in that case, that the Crown was not bound to pay wharfage duties under 6 Geo-IV Ch. 116, for stones which were brought by a barge into the harbour for the purpose of being used on Government works which were being carried on there. The *Chief Justice* refers to both these grounds, as being based upon "two great rules which, from an early period of our history, have obtained as to the royal prerogative." The decision was arrived at notwithstanding that there were only certain specified exemptions in the statute in favour of the Crown, from which it was argued that it was to be inferred that it was intended by the Legislature that there should be no other exemptions. This argument did not prevail, the *Chief Justice* holding that such exemptions were inserted '*ex majore cautela*' and were intended to meet cases, which it was thought, would most likely arise.

This decision follows the principle laid down in the earlier case of *Westover v. Perkins* (2 Ellis and Ellis p. 57) which is also relied upon by the learned Advocate-General and in which Lord *Campbell* said, "From time immemorial the sovereign has been exempt from toll and where tolls are enforced by statute there is an implied exemption of the Sovereign's property." In the case of *Smithett v. Blythe* (1 Barn. and Adol. 507) also cited in support of the petition, the question turned upon 3 Geo. II Ch. p. 36, which confirmed a patent formerly granted by the Crown for taking tolls in respect of a light-house. There was a proviso that nothing in the

Act should extend to charge the King's ships-of-war with the duties granted by the Act or patent. At the time of the passing of the statute, the post office packets in respect of which toll was claimed from the Crown were not ships owned by the Crown. It was held, that the exemption of His Majesty's ships-of-war did not by implication render post office packets, which some years after the passing of the Act became the property of the Crown, chargeable with toll.

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These three cases proceed on one and the same principle and they relate to the implied exemption of the Crown from payment of tolls; in each of them it was held that such implication was not negatived by the mere fact that certain exemptions in favour of the Crown were expressly made none of which covered the exemption claimed.

It is unnecessary to refer specially to the *Mersey Docks case* (11 H. L. C. 443 and 508) which is the leading authority on the implied exemption, from rates and taxes, of Crown property occupied by or on behalf of the Crown for purposes connected with any department of the Government, as that decision has been followed and fully explained in the later decision of the House of Lords in *Coomber v. Justices of Berks*, already referred to and quoted from.

The cases of *Perry v. Flames* [(1891) 1 Ch. 658] and *Wheaton v. Maple and Co.*, [(1898) 3 Ch. 48] which are also referred to, are not very much in point. Those cases turned upon sections 2 and 3 of the Prescription Act (2 and 3 William IV. C. 71). It was held that the former section in which the Crown is specially named did not apply to an easement of light which is specially and exclusively governed by section 3, in which the Crown is omitted, notwithstanding that the Crown is expressly mentioned in sections 1 and 2, and that, therefore, no easement of light against the Crown can be acquired by prescription under section 3.

I shall now proceed to refer to certain Indian decisions, which have a bearing upon the question under consideration. In the *Secretary of State for India v. Bombay Landing and Shipping Company* (5 B. H. C. R. O. C. J. 23), *Westropp, C. J.*, after a full investigation of the various systems of law, including the Hindu and Mahomedan laws, as to the prerogative priority of Crown-debts,

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held that a judgment debt due to the Crown was in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there were no special legislative provision affecting that right in the particular case. In answer to the argument that section 183 of the Indian Companies Act (X of 1866) was such special legislative provision, he held that as the Crown was not either expressly or by implication bound by section 183, the prerogative of the Crown was not affected. In the soundness of this decision on both the points I fully concur. In this case the general words of section 183 would, if literally construed, divest the Crown of one of its prerogatives and it was rightly held that the section cannot be so construed, as it did not appear either in express terms or by implication that it was intended by the Legislature that the section should have such effect.

In *Ganput v. Collector of Kanara* (I. L. R. 1 B. 7) the question raised was whether the Crown has the first claim to the proceeds of a pauper suit, to the extent of the amount of Court fee that would have been payable at the institution of the suit had the plaintiff not been a pauper. It was held that the Crown had such priority by reason of its prerogative and that section 309 of the Code of Civil Procedure (VIII of 1859) which enables Government to recover the same in the same manner as costs of suit are recoverable, does not divest the Crown of its prerogative. This provision simply enables the Government to recover the debt due to it on account of court-fees which forms an item of costs in the suit, by mere process of execution, instead of by a separate suit and it cannot, therefore, be construed as taking away by implication the priority which the claim of the Crown has by virtue of its prerogative. *West, J.*, states the canon of construction applicable to such a case as follows—"It is a universal rule that the prerogative and the advantages it affords cannot be taken away except by consent of the Crown embodied in a statute. This rule of interpretation is well established and applies not only to the statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules in England. And the rule as applied to the present case is not an unreasonable one." This decision was approved of and followed by the High Court of Allahabad in *Collector of Moradabad v. Muhamad Daimkhan* (I. L. R., 2 A. 196). I may refer to section 212 of the Indian

Companies Act, 1882, which corresponds to and substantially reproduces section 183 of the Act of 1866, with a proviso that nothing in that section applies to Government and also to section 411 of the present Code of Civil Procedure (XIV of 1882) which corresponds to section 309 of Act VIII of 1859 with an additional clause that the amount due to Government shall be a first charge on the subject matter of the suit. These additions simply give legislative sanction to the above decisions and have been made only "*ex majore cautela*."

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In *Ramachandra v. Pichai Kannu* (I. L. R. 7 M. 436) the question arose whether arrears of rent due by an Abkari renter—which are not charged upon his land—take precedence of a hypothecation debt due by the renter. It was decided and, in my opinion, rightly, that it had no priority over a mortgage debt. But with all respect to the learned judges who decided the case, I see no reason to doubt the decisions of the Bombay and Allahabad High Courts in the above two cases.

I shall now turn to a few more Indian decisions which bear on the question of the law of limitation and prescription as affecting the Crown. In the *Secretary of State for India v. Mathura Bhai* (I. L. R. 14 B. 218) the Chief Justice following the rule of interpretation of statutes applicable to the Crown, which was laid down in the 1 Bombay case already referred to held that section 26 of the Indian Limitation Act (XV of 1877) in which the Crown was not mentioned and which section has since been transferred to the Indian Easements Act with an additional special provision prescribing a period of 60 years for acquisition of rights of easements by limitation against the Crown, was not applicable to the Crown and that no right of easement can be acquired against the Crown under that section.

In *Aryan v. Bhakal Chunder Roy Chowdry* (I. L. R. 10 C. 214) it was assumed that section 26 which provided a period of only 20 years for acquisition of rights of easement by prescription was applicable as against the Crown. In *Appayya v. Collector of Vizagapatam* (I. L. R. 4 M. 155) the question was whether the Crown was bound by the 3 years period of limitation prescribed for application for execution of decrees, and it was held that it was bound. "We are of opinion that the Government is not entitled

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to any exemption from the provisions of the Limitation Act relating to applications. If the maxim on which the counsel for the Crown relies applies to this country—and the Crown is not bound by the provisions of any Act unless they are expressly declared binding on the Crown—it may be inferred from the circumstance that this Act contains provisions prescribing a limitation to the Government for the institution of suits and presentation of criminal appeals, that the Legislature contemplated that the Crown should be bound by the provisions of the Act and should enjoy a privilege to the extent expressed and no further—*expressum facit cessare tacitum*” (pp. 156-157). The same view was taken by the High Court of Bombay in *Venubhai v. Collector of Nasik* (I. L. R. 7 B. 552 foot-note.)

In the *Secretary of State v. Virarayan* (I. L. R. 9 M. 175) the question as to how far the Crown was bound by the earlier laws of limitation prior to Act IX of 1871, in which the Crown was not at all mentioned, was raised, but not decided (p. 185.)

Adverting to the English maxim of interpretation that the Crown is not bound by a statute unless expressly named, Mr. *Sedgwick*, an American author observes: “But in this country generally I should doubt whether this construction could be safely assumed as a general rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative; and where the terms of an Act are sweeping and universal, I see no good reason for excluding the Government, if not specially named, merely because it is Government.” (‘Construction of statutory and constitutional laws,’ p. 27). Mr. Endlich, another American author says, “The test, therefore, in every case in which the question whether or not Government is included in the language of a statute, has to be met and determined, cannot be a mere general rule either one way or the other, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischief it is to remedy and the consequences that are to follow—starting with the fair and natural presumption that primarily the Legislature intended to legislate upon the rights and affairs of individuals only.”

Turning now to the policy and course of Indian legislation, which, I may say, for upwards of 50 years has been under the direction and control of some of the most eminent English jurists and

parliamentary draftsmen—not to say that some of the more important measures were actually drafted and settled by eminent English judges before being introduced into the Indian Legislative Council—it is noteworthy that as a general rule Government is specially excluded, whenever the Legislature considered that certain provisions of an enactment should not bind the Government; and this feature is specially noticeable in measures of taxation, whether imperial, provincial or local and whether such taxes are levied by Government or by 'local authorities' [X of 1897, 3 (28)] who as a rule have to administer their funds subject to the control of Government. I know of only one instance—possibly there may be a few more, though I doubt it—in which the Crown is expressly included, i. e., section 17 of the Inventions and Designs Act, 1888, which is substantially a reproduction of section 27 of the English Patents etc. Act, 1883.

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By way of illustration, I may mention the following instances in which Government has been specially exempted:—

Indian Contract Act, section 74—the exception provides that when any sum is fixed by way of liquidated damages payable to Government, the whole amount shall be recoverable and not merely reasonable compensation to be fixed by the Court.

Specific Relief Act, section 9—Government is excepted from the operation of this section under which a summary suit may be brought by a person dispossessed, without his consent of immoveable property otherwise than in due course of law. Section 45—The Secretary of State for India in Council, the Government of India and the Local Governments are exempted from writs of Mandamus to be issued by the High Court. Section 56 (d)—exempts the various departments of the Government of India and of the Local Governments from writs of injunction.

Indian Registration Act, section 90—exempts from the operation of the Act various documents issued by Government.

Indian Easements Act, section 2 (a) and (b)—exempts certain prerogatives and customary rights of the Crown from the operation of the Easements Act.

The Crown Grants Act (XV of 1895)—exempts Crown grants from the operation of the Transfer of Property Act, both retrospectively and prospectively.

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The Civil Procedure Code, sections 295 (proviso), 356 (b) and 411—preserve the precedence of Crown-debts. 616 (a)—exempts from the operation of the chapter relating to appeals to the Queen in Council, the prerogative rights of Her Majesty to receive and admit appeals.

Indian Companies Act—212 (proviso), exempts proceedings by Government against Companies in liquidation from being invalidated under the section.

Sea Customs Act, 1878, section 20 (proviso), exempts goods belonging to Government from liability to customs duties. There is a corresponding exemption in the Indian Tariff Act.

Indian Ports Act, 1899, section 1 (4) i—exempts from the operation of the Act vessels belonging to or in the service of Her Majesty or the Government of India.

Indian Stamp Act, 1899, section 3, proviso (1) is as follows:—"That no duty shall be chargeable in respect of any instrument executed by or on behalf of or in respect of the Government, in cases where, but for this exemption, the Government, would be liable to pay the duty chargeable in respect of such instrument." This is a legislative declaration that but for this Government would be liable to pay stamp duty in cases in which according to the rules laid down in section 29, the liability will devolve upon Government and not upon the other party to the instrument. Such a declaration is very significant in that neither in section 29 nor in any other section is Government expressly or by necessary implication included. There is no similar exemption in favour of Government under the Court Fees Act. Government pays court-fees like other litigants and, if successful, recovers the same as costs from the adversary and thus it will be seen that Government is really benefited. There is also another weighty reason against the exemption of Government from paying court-fees, for the result of such exemption would naturally be to increase the burden of court-fees upon the rest of the litigants by raising the scale of fees. Under the various Municipalities Acts, Government is specially exempted from payment of certain specified tolls and taxes, but not from others. In the *City of Madras Municipality Act* (Madras Act I of 1884) itself—Section 154 (a) exempts "gun-carriages,

ordnance carts or wagons, cavalry horses or any vehicle or animal belonging to the Government' from payment of taxes on vehicles or animals; section 164 (a) exempts gun-carriages, ordnance carts or wagons or other such property of Government from liability to registration and payment of fees therefor; section 174 exempts Government from payment of tolls under section 170; the provisos to sections 332, 335 and 338 exempt places in the occupation or under the control of Government from the operation of those respective sections and the necessity for obtaining licenses on payment of fees.

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India Act XI of 1881 has a most important bearing upon the question immediately under consideration. Section 3 provides that, notwithstanding anything contained in any enactment for the time being in force, the Governor-General in Council may by an order in writing prohibit the levy by a municipal corporation of any specified tax payable by the Secretary of State for India and section 5 provides that so long as any order thus made under section 3 is in force, the Secretary of State shall be liable to pay to the municipal corporation in lieu of such tax such sums as an officer from time to time appointed in this behalf by the Local Government may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable. There is no provision in any of the Municipalities Acts I am aware of, which expressly subjects the Government to any tax or duty payable under the Act. And if the contention on behalf of the petitioner that it is not liable to pay any tax or duty unless there be express provision imposing the same on Government, be well-founded there would have been no object in passing the said enactment and it will have to remain a dead letter. The policy of the Indian Legislature is clearly indicated by the said Act XI of 1881, viz., that Government should be liable to municipal rates and duties unless specially exempted by law; but that when there is no such exemption, the Governor-General should be empowered by law to suspend the ordinary procedure, the levy and collection of a tax or duty payable to a municipal corporation, without depriving the municipality of the probable amount which Government would reasonably have to pay if the duty or tax was paid and collected according to the ordinary procedure. A similar policy underlies the Government Buildings Act IV of 1899 and the Indian Tolls (Army) Act II of 1901.

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The learned Advocate-General relying upon the observations of *Lord Herschell in Bank of England v. Vagliano Brothers* [(1891) A. C. 107 at pp. 144-145] urges that these and other similar enactments should not be referred to in construing section 341 of Madras Act 1 of 1884. This contention is, in my opinion, entirely inadmissible and the authority invoked in no way supports it. In that case the question turned upon the construction of section 7 (3) of the English Bills of Exchange Act, 1882, and *Lord Herschell*, in differing from the Court of Appeal as to the construction of the said provision, observed that "the proper course in the construction of an enactment is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" and that, in his opinion, the Bills of Exchange Act was certainly not intended to be a mere Code of the existing law and that it is not open to question that it was intended to alter and did alter it in certain respects and that it should not be presumed, that any particular provision was intended to be a statement of the existing law rather than a substituted enactment. He, however, guarded himself by saying that he was, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of a Code and that, for example, if a provision be of doubtful import, such resort would be perfectly legitimate, or again, if in an enactment words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one, the same interpretation might well be put upon them in the new enactment, and that he gave these merely as illustrations, not as exhausting the category.

This rule of interpretation was followed in *Robinson v. Canadian Pacific Railway* [(1892) A. C. 487] in regard to the construction of a section in the Civil Code of Lower Canada and recently in an Indian case in *Narendra Nath v. Kamal Basini Dasi* (L. R. 23, I. A. 18 at p. 26) in construing section 111 of the Indian Succession Act which section was incorporated in the Hindu Wills Act. In

the last mentioned case it was held that a statute intended to embody in a Code a particular branch of the law must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered.

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The principle of interpretation affirmed in these cases in each of which the question turned upon the construction of a section in a statutory code does not in the least militate against the long established rule of construction that in regard to the construction of any particular Act, recourse may and ought to be had to other Acts of similar scope on similar subjects (*vide Colquhoun v. Brooks*, L.R. 14 A. C. 493 at p. 511) and that Acts which are in *pari materia* "are to be taken together as forming one system" and though made at different times or even expired and not referring to each other, they shall be taken as 'interpreting and enforcing each other.'

Instead of trying to interpret section 341 of Madras Act I of 1884, 'by roaming over a vast number of authorities in order to discover, by a minute and critical examination,' what the case law in England is as to the exemption of the Crown from the payment of tolls, poor-rates and other taxes imposed by statutes—a course deprecated by Lords *Herschell* and *Macnaghten* in the cases above referred to,—it will certainly be much safer to interpret the section with reference to the course of Legislation in India and the Acts already referred to in *pari materia* with Madras Act I of 1884.

The conclusions, therefore, I come to are, that:—

- i. the canon of interpretation of statutes that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the statutes passed by the Indian Legislatures as to Parliamentary and Colonial statutes; and this is really concluded by the authority of the Privy Council in more appeals than one from the Colonies;
- ii. when in an Indian Act the Crown is not expressly included and the question is whether it is bound by necessary implication, the course of Indian legislation and Acts in *pari materia* with the Act in question

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will have an important bearing upon the construction of the Act;

- iii. notwithstanding that in several Indian enactments the Crown has been specially exempted, the above rule of interpretation will nevertheless hold good in construing the provisions of an enactment from the operation of which the Crown is not expressly exempted, when a question is raised as to whether such provisions take away a right, or prerogative of the Crown;
- iv. the said rule, based like other cognate rules of construction upon the maxim '*generalia specialibus non derogant*' is not really a prerogative of the Crown, though such rule as well as the rule relating to the construction of Crown-grants are dealt with in treatises under the head of 'prerogatives of the Crown' and also loosely referred to as such in some English decisions ;
- v. the English law as to the exemption of the Crown and Crown property from payment of tolls, poor-rates and other taxes, local or imperial, imposed by statutes rests partly upon historical reasons and principally upon judicial decisions which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts ;
- vi. exemption from payment of tolls, rates and taxes is not in reality a prerogative of the Crown, but depends solely upon the right construction to be put upon the Crown-grant or the statute in question ;
- vii. since the passing of the Indian Councils Act, 1861, not only the Viceregal Council but also the Provincial Councils can, without obtaining the previous sanction of the Crown, make laws affecting the prerogatives of the Crown, when such prerogatives have no relation to any of the matters specially exempted from their respective legislative jurisdictions ;
- viii. even if the imposition of a duty or tax upon Crown property be regarded as affecting the prerogative of the Crown, it

is competent for the Provincial Legislatures to impose such duty or tax, which will be payable out of the current public revenue, measures affecting which or imposing charges whereon, are specially contemplated by section 38 of the Indian Councils Act, as being within the competence even of Provincial Legislatures ;

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- ix. according to the uniform course of Indian Legislation, statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be inapplicable to Government and whenever it is the intention of the Legislature to exempt Government from any duty or tax which in its nature is not inapplicable to Government, the Government is specially exempted, and this is specially so in regard to taxes imposed by the Legislature for the benefit of local authorities, and in particular, Municipalities ;
- x. timber brought, into the City of Madras, by or on behalf of Government, is liable to the duty prescribed by section 341 of (Madras) Act I of 1884.

The Revision Petition therefore fails and ought to be dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Iyengar.

Zamindar of Vizianagram ... Appellant*
(Defendant).

v.

Suryanarayana Patrulu ... Respondent
(Plaintiff).

*Civil Procedure Code, Ss. 269 and 316—Transfer of Property Act, Ss. 55(1)d and (5)b, 108 and 111—Limitation Act, Arts. 109 and 116—Lease for term—Possession—Vizianagram
Mode of delivery—Expiry of term—Rights of lessee, on failure to get possession—Damages. v.
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A lessee for a term of years can, on not being let into possession by the lessor, only claim to be put into possession for the unexpired portion of his term or if the

Zemindar of term has already expired, only claim to recover damages but not to be put in possession for a corresponding term from the date of his being placed in possession.

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Where the transaction is one of lease, the lessor is bound to place his lessee in possession and this obligation the lessor must perform notwithstanding that the lessee could take legal proceedings to recover possession himself from the persons in occupation and notwithstanding that the lessee may have covenanted to be faithful to the lessor and give him the necessary information and do other acts recited in the lease. Where the ryots are in occupation of land, mere execution and delivery of the lease will not constitute delivery of possession of the demised land but delivery must be made to the lessee in the manner contemplated by the Ss. 264 and 319, C. P. C. unless the lessee in collusion with the lessor's vendor obstructed the lessor from obtaining possession and did so in order that possession might be retained by the vendor himself and not that he might get possession himself as lessee, or unless the lessee forfeited the lease by reason of breach of some of the stipulations in the lease giving the lessor a right of re-entry on such breach and the lessor did some act showing his intention to determine the lease.

The said two sections embody the customary law obtaining specially in Zemindaris and other similar estates, according to which delivery of possession, in cases of transfers by sale, gift, or otherwise is made by the issue of orders or notices to the karnams and other village officers collecting rents from the ryots and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of land giving intimation of the transfer and requiring them to attend and pay the rents to the transferee.

Where the lessor has from the commencement of the lease ignored the lease and prevented the lessee from taking possession, no intention on the part of the lessor to determine the lease on the ground of forfeiture can be presumed.

A condition in the lease that the lessee should be faithful to his lessor and should not act contrary to his interest or authority can only be construed as having reference to the relation of lessor and lessee.

Where the lessee was not given possession of the demised property from the lessor, his conduct in deposing against the interest of the lessor in a suit brought by the latter against his vendor—whether such evidence be true or false—cannot be taken to be a breach of the condition to remain faithful to the lessor and not to act contrary to his interest.

Where, therefore, a lessor obtained possession from his vendor several years after the term of the lease had begun to run and when only a small part of the term remained unexpired and the lessor brought his suit to recover possession under the lease for a term corresponding to the one mentioned in the lease but commencing either from the date of plaint or from the date when the lessee obtained possession from his vendee and the District Judge gave him a decree for possession for a term commencing from the latter date.

Held (1) that the District Judge was wrong and that the plaintiff was not entitled to a new lease upon a different term to the one agreed upon in the lease actually executed between the parties.

and (2) that although some part of the term remained unexpired when the lessee filed his plaint yet as it had expired during the pendency of the appeal and the execution of the decree had been stayed pending appeal he could not be given any decree for possession but could only be entitled, to damages.

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The lessee is entitled, at his election, to claim either profits of immoveable property wrongfully received by the lessor for the lessee's use or damages for breach of the lessor's obligation to put the lessee in possession.

A suit for recovery of damages for breach of such obligation is governed in the case of a registered lease by the rule of six years under Art. 113 of the Limitation Act.

Where the lessee's claim for profits of immoveable property wrongfully received by the lessor would be barred by Art. 109 of the Limitation Act he will be entitled to claim damages for breach of the lessor's obligation.

The measure of damages in such a case is the amount of profits which would have accrued to the lessee if the landlord had placed him in possession with interest thereon at 6 per cent. per annum.

Appeal from the decree of the District Court of Vizagapatam in Original Suit No. 20 of 1899.

The facts are sufficiently stated in the judgment of the Court.

C. Sankara Nair and *T. Rangachariar* for the appellant.

P. R. Sundara Iyer, C.R. Tiruvenkatachariar and *V. Ramesam* for the respondent.

The Court delivered the following

JUDGMENT :—Respondent as the lessee under the late Maharajah of Vizianagram, the predecessor in title of the defendant, under a registered instrument in writing, dated 11th November 1893, for a term of 7 years and 8 months ending with June 1901, brought this suit on the 11th November 1899, alleging that he has not been put in possession of the villages let to him and that in February 1898, defendant had recovered possession of the villages from the vendor who on the 23rd October 1893, executed a registered sale-deed in favour of the late Maharajah of Vizianagram, and praying that he may be put into possession of the villages for a term of 8 years (meaning apparently 7 years and 8 months) either from the date of the plaint (11th November 1899) or from February 1898. He also claimed Rs. 2,000 for damages from February 1898 to the end of July 1899, presumably in the event of the term commencing from February 1898. He also claimed in the alternative that in the event of the Court holding that he cannot

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recover possession of the villages for the said term, he may be awarded as damages a sum not exceeding Rs. 9,000 in addition to the Rs. 2,000 already referred to. The defendant, while admitting the lease sued upon, resisted the suit by alleging that the plaintiff who was the manager of the vendor of the villages in question, instigated the vendor to contend that the sale-deed was false and inoperative and in collusion with the vendor prevented the vendee, the lessor of the plaintiff, from getting possession of the villages and that the plaintiff also forfeited the lease by his misconduct. The defendant also pleaded that even if the lease is to be enforced, the plaintiff can be put into possession only till June 1901 and that the claim for damages is unsustainable. The following issues were framed :—

- (1). Whether the lease in favour of plaintiff has become inoperative by plaintiff's conduct (collusion and denial of title) ?
- (2). Whether it is forfeited ?
- (3). Whether the plaintiff sustained any, and if so, what damages ?
- (4). If the lease is valid and binding on defendant, whether the term of 8 years can now be enforced ?
- (5). What relief is plaintiff entitled to ?

On the 23rd April 1900 the District Judge passed a decree in favour of the plaintiff directing the defendant to deliver possession of the villages to the plaintiff for 8 years from February 1898 together with profits for the year 1899—1900, and subsequent profits till date of delivery besides paying Rs. 2,000 on account of damages for the plaintiff having been kept out of possession from February 1898 to the date of the suit (11th November 1899).

Against this decree the defendant appeals and the chief contentions raised in support of the appeal are :—

- (1) that the decree for possession for 8 years from February 1898 is in any event clearly wrong ;
- (2) that it was owing to the plaintiff's obstruction that the lessor (the defendant) was unable to get possession from the vendor and put the plaintiff in possession of the villages ;
- (3) that the plaintiff (respondent) has forfeited the lease by reason of his conduct both before and during the prosecution

by the defendant of O.S.No. 34 of 1894 instituted by the defendant Zemindar of Vizianagram against the vendor for the recovery of the villages ; and

(4) that the suit is barred by the law of limitation.

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The first contention is well founded and we are unable to see on what principle the District Judge converts a lease for a term of 7 years and 8 months ending with June 1901 into one for an equal period ending with February 1906. The fact that the lessor obtained possession from the vendor only in 1898 can be no reason for substituting a new lease in lieu of the one actually agreed to between the parties and given. The finding, therefore, of the District Judge on the 4th issue and the decree as given are manifestly untenable, and the respondent's vakil is not able to support the same. So far as the plaintiff's prayer for possession is concerned, he can recover possession only for the unexpired portion of the term ending with June 1901 ; but as that also has expired during the pendency of this appeal—and the execution of the decree has been stayed until the disposal of this appeal—the real question to be determined in the case is whether the alternative claim advanced by the plaintiff, on which alone he now principally relies, is sustainable.

We agree with the District Judge in his finding on the first issue that no collusion between the plaintiff and the vendor, such as would make the lease inoperative, has been established, nor that the plaintiff prevented the vendee—his lessor—from getting possession of the villages. And we also agree with him in his finding on the second issue that no specific denial of the lessor's title by the plaintiff has been made out and that the plaintiff not having been put into possession, there has been no forfeiture, by him of the lease. We cannot accede to the contention of the appellant's pleader that having regard to the peculiar terms of the lease sued upon, the legal relation between the plaintiff and the predecessor in title of the defendant should not be regarded as that of an ordinary lessor and lessee whose mutual rights and liabilities are regulated by the principles of law enunciated, among others, in sections 108 and 111 of the Transfer of Property Act. The transaction is essentially one of lease, and it is not the less so because the lessee represented that he would be faithful to, and merit the favour of, the late Maharajah, and would give him information of things that take place and, among other things, stipulated, in view to

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ensuring the punctual payment of rents to the lessor out of the actual collections, that he would hold his cutcherry in the building provided for the Sircar cutcherry in the principal village and secure the collections in a box under a joint seal of himself and the lessor's clerk and also undertook to give sub-leases only to solvent persons and to act as the lessor's agent in respect of certain repairs of tanks, &c., and in regard to certain descriptions of land not included in the lease, receiving a remuneration of 15 *per cent* on the income derived from such lands. So far therefore as the lease of the villages in question is concerned and the suit is only in regard to the lease—the plaintiff is, in the absence of any justification on the part of the defendant, clearly entitled to damages for not having been put into possession of the villages comprised in the lease although by his petition, Exhibit III (b), dated 5th December 1893, he brought to the notice of the late Maharajah of Vizianagram that his Muktyar Jagannatharaju Pantulu Garu and others were delaying the registration of the lease and did not put him into possession of the villages leased, but on the contrary were issuing orders directing the ryots and others in the villages comprised in the lease not to pay to anybody the rents due for the current year without the orders of the lessor's Sircar, and requested the Maharajah, immediately on receipt of the petition, to have the cowl registered, to put him in possession of the villages leased to him and to issue orders not to obstruct him in the collection of rents in the different villages leased to him. It is urged on behalf of the appellant that as the plaintiff was only an Ijaradar or lessee under the late Maharajah, the ryots being in actual occupation of the land, the lessor by the mere execution and delivery of the lease, did put the plaintiff in such possession as the subject-matter was capable of and that, without any further act on the part of the lessor, it was open to the lessee to collect the rents and recover the same, if necessary, by instituting legal proceedings against the ryots. This argument may seem plausible, but no more so than in the case of a lease of land itself, for even if the lessor does not put the lessee into possession of the land it would be open to the lessee to recover possession of the land by instituting, if necessary, a suit in ejectment against the person who wrongfully withholds possession from the lessee. The subject-matter of the lease was capable of delivery in a manner analogous to the mode indicated by sections 264 and

319 of the Code of Civil Procedure. According to the common law of the land which specially prevails in Zemindaris and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof by sale, gift, lease or otherwise is by the issue of orders or notices to the Karnams and other village officers whose duty it is to collect rents from the persons in occupation of the land and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of the land, giving intimation of the transfer in question and requiring them to attorn and pay rents to the transferee. It is really this customary law that is embodied in sections 264 and 319, C.P.C., and adapted for the delivery, by court, to the decree-holder or purchaser in execution of a decree, of all descriptions of immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Admittedly no such notices or orders were issued to the village officers or ryots of all or any of the villages in question by the late Maharajah or his officials.

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It is next urged that the plaintiff himself in conjunction with the vendor, whose manager he was, prevented the lessor from obtaining possession of the villages from his vendor. The argument on this part of the case proceeded tacitly on the footing that the lease was not one independent of the sale transaction, and that the vendor himself was really the lessee under the vendee, the plaintiff being merely the nominal lessee. If that were really so, the argument would have been conclusive. The plaintiff, however, brought the suit as the real lessee, and para 3 of the written statement expressly treats the plaintiff as the person who applied for the lease and to whom the lease was given and intended to be given; and it is nowhere suggested, either in the written statement or even in the examination of the witnesses, that the plaintiff was only a benami lessee; and the issues proceed on the express footing that the plaintiff himself was the lessee. If he was the real lessee it would *prima facie* be certainly detrimental to his interests that he should prevent his lessor from getting possession of the villages from his vendor, and the onus lies very heavy on the defendant to establish that he really did do so and to suggest some motive for his doing so. The sale took place on the 23rd

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October 1893, and the lease was granted to the plaintiff almost immediately thereafter, on the 11th November following. If the lessee was taking steps to prevent the Zemindari officials from collecting the rents, in order that he might obtain possession and collect rents as lessee, the lessor cannot complain that he was prevented from obtaining possession from his vendor, and that by reason of such conduct on the part of the plaintiff he was unable to deliver possession of the villages to him. It will not be enough for the defendant simply to show that the plaintiff tried to obtain possession. He must show that he actually assisted the vendor and in collusion with him prevented the late Maharajah of Vizianagram from getting possession, and did so in order that possession might be retained by the vendor himself. The evidence on behalf of the defendant, such as it is, falls far short of this and is indeed very meagre. [Their Lordships then discussed the defendant's evidence on the point and continued :—] It is unnecessary to consider the evidence on behalf of the plaintiff on this point, and the defendant on whom the onus lies has entirely failed to establish by any credible evidence, that the plaintiff in collusion with the vendor, prevented his lessor—the vendee—from taking possession of the lands bought by the latter, or that he wrongfully induced the vendor not to deliver possession of the villages sold by him.

The third contention that the lease has been forfeited and that the plaintiff is not entitled to any damages, is equally untenable. If the lessor was in default in not delivering possession of the property let to the lessee, it is difficult to see what is the condition in the lease which the plaintiff has violated. The lease provides that in default of the lessee paying the different instalments of rent on the due date, the lessor may re-enter and either continue the lease in favour of the lessee or give a lease of the villages to others. The lease after imposing certain other conditions upon the lessee, every one of which presupposes that the lessee has obtained possession, provides as follows :—“ If it should come to your notice, and if it is proved positively that I have violated any of the aforesaid conditions, or that I have proved faithless to the Sircar and acted contrary to their interest and authority, the Sircar may lease out the taluk to others as it pleases without having anything to do with the conditions hereinbefore

setforth." The appellant's pleader argues that the plaintiff deposed against the interest of the defendant in O. S. 34 of 1894, that his evidence was disbelieved, and that therefore it must be taken that he has proved faithless to the defendant, and acted contrary to his interest and authority. That was a suit brought by the defendant against the vendor. In that case, the vendor—the defendant therein—raised various pleas in answer to the suit, among others, that the sale-deed was really intended to operate only as a mortgage-deed and that the vendee did not pay the full amount of the consideration for the transaction. The vendor's minor sons also, who were joined in the suit, raised special pleas in resisting it. Eventually the suit was decided against the vendor and in favour of the plaintiff in that suit—the defendant herein. The condition in the lease that the plaintiff, should be faithful to his lessor and not act contrary to his interest or authority, can be construed as having reference only to their relation as lessor and lessee of the villages comprised in the lease. The lessor not having done all that was in his power to deliver possession to the lessee, plaintiff cannot be charged with having acted contrary to the interest of his lessor in the matter of the lease, by deposing in favour of the vendor, whether falsely or truly, as a witness in O. S. 34 of 1894. His deposition in that suit has been marked as Exhibit II herein and he there distinctly stated as follows:—

"Plaintiff's (lessor's) men prevented me from getting possession; plaintiff sent notices to the ryots not to pay rent either to 1st defendant (vendor) or to me; 1st defendant also issued notices not to pay either to plaintiff or to me. Thereupon, I sent registered letters to the plaintiff saying that I had not been put in possession, and that unless he put me in possession, he would be liable for any losses I sustained thereby. No reply was sent * * * * * I did not try to collect rents on behalf of 1st defendant; I tried to collect rents on my own behalf. I don't know if my brother tried to collect any rent on behalf of the 1st defendant. About 3 months after the sale-deed, 1st defendant told me not to collect rents as renter. The plaintiff collected the rents of some villages in October 1893. 1st defendant also collected the rents of some villages." Even if the lessor had done all that he ought to have done to put the plaintiff into possession, it has not been shown how the deposition of the latter in O. S. 34 of 1894 would subject

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him to a forfeiture of the lease, merely because his evidence was adverse to the contentions raised in that suit by his lessor. Even assuming, for the sake of argument, that the plaintiff incurred a forfeiture of the lease, either because he broke an express condition providing that on breach thereof the lessor may re-enter or the lease shall become void, or because he renounced his character as lessee by setting up a title in a third person, there is nothing to show that the lessor did any act showing his intention to *determine* the lease. From the very commencement and before any forfeiture could possibly have been incurred by the lessee, the lessor completely ignored the lease. After recovering possession of the villages from the vendor in 1898, the defendant issued a notice to the plaintiff (Exhibit B, dated 14th February 1898) informing him that the lease under which he was claiming to get *Muchilikas* from the ryots ceased from the date that the estate was taken under management by the Government and warning him from further interference with the *Samasthanam* and its ryots. This notice clearly shows that there was no forfeiture of a lease and that the same was not *determined* by reason of any such forfeiture. The plaintiff, therefore, is clearly entitled to damages on the alternative case set up by him in the plaint. He may elect to claim either profits of immovable property to which he was entitled, but which have been wrongfully received by the defendant or damages for breach of the obligation to put him in possession of the villages subject of course to the law of limitation applicable to each.

The defendant obtained possession from the vendor only in February 1898 and the plaintiff can claim mesne profits against the defendant only from that date, until the expiration of the term of the lease in June 1901. The defendant, no doubt, obtained a decree, in ejectment, against the vendor, in O. S. No. 34 of 1894, with mesne profits, prior to February 1898; and if he did realize the mesne profits awarded, from the vendor who was wrongfully receiving the profits of the land, subsequent to the sale by him and to the lease by the vendee in favour of the plaintiff, the plaintiff may possibly be entitled to recover the same from the defendant. But it does not appear that the defendant did recover the mesne profits awarded to him in the decree in O. S. 34 of 1894 or any portion thereof, and the appellant's pleader

states that the same has not been realized and there is no likelihood either of its being realized. However this may be, in any event, under Art. 109 of the 2nd Schedule to the Limitation Act, the plaintiff cannot claim mesne profits for any period prior to 11th November 1896, and the respondent's Vakil, therefore, prefers that damages should be assessed on the footing of the lesser's breach of obligation to put the plaintiff into possession, either on the 11th November 1893, when the lease was completed, or on the 5th December 1893 [the date of Exhibit III (a)] when plaintiff requested to be put in possession. It is, however, contended on behalf of the appellant that the claim for damages on this footing is barred by the law of limitation, and that Art. 116 of the Limitation Act prescribing a period of 6 years is inapplicable to the case and that the period of limitation applicable is only 3 years, though it is not specified under what article of the Limitation Act. In our opinion, the case is governed by Art. 116, and it is immaterial whether the period of 6 years is to be reckoned from the 11th November or the 5th December 1893, inasmuch as the suit was instituted on the 11th November 1899. The lease is in writing registered and the plaintiff's claim for damages is within the meaning of Art. 116, one for compensation for the breach of a contract in writing registered. In *Coe v. Clay* (5 Bing. 440) the defendant had agreed to let the plaintiff certain premises *per verba de praesenti* and the action was brought for the recovery of damages for not letting the plaintiff into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect. It was contended on behalf of the defendant that the plaintiff had shown no breach, in that, the agreement amounting to an actual demise of the premises, the plaintiff had an interest upon which he might have brought an ejectment, and it was no default in the defendant, if a person not claiming under him committed a wrong for which the plaintiff had a distinct remedy by ejectment. This plea was overruled, and it was held that he who lets agrees to give possession and not merely to give a chance of a law suit. This decision was followed in *Jinks v. Edwards* (11 Exch. 775) on the ground that the instrument in that case operated, as in *Coe v. Clay*, as a lease and not a mere agreement to give a lease. We may also refer to *Drury v. Macnamara* (5 E. and B. 612, 25. L. J. Q. B. 5) which was distinguished from *Coe v. Clay*, on the ground that the instrument relied

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on in the case did not operate as a lease, but was merely an executory agreement. Section 108 (b) of the Transfer of Property Act simply lays down the law as it existed prior thereto in accordance with the above decisions.

Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant, but in the absence of a contract to the contrary, is also construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature admits and the breach of such obligation is breach of a contract in writing registered, within the meaning of Art. 116 of the Limitation Act. The present case is stronger as to the application of Art. 116 than *Krishnan Nambiyar v. Kannan* (I. L. R., 21 M. 8) which is relied upon by the respondent's pleader. The appellant's pleader relies upon *Viarvan v. Ponnaiyya* (I. L. R. 22 M. 14) and *Avuthala v. Dayumma* (I. L. R., 24 M. 233) and draws particular attention to section 55 (5) (b) of the Transfer of Property Act in connection with the latter case. The first of the two cases cited on behalf of the appellant has no bearing upon the question under consideration. In the second, it was held that Art. 116 was inapplicable to a personal claim against the vendee for payment of the purchase money, when it was sought to apply that article by reason of the registered sale-deed having acknowledged receipt of the payment of purchase-moneys, and the claim for purchase-money was made not under the document evidencing the sale-deed but in spite of it. Referring to the case of *Krishnan Nambiyar v. Kannan*—now cited on behalf of the respondent—the learned judges observed as follows:—"The obligation on the part of the buyer to pay the purchase money is different from the obligation arising under a covenant for title, such as was in question in the case cited (I. L. R., 21 M. 8). The obligation to pay arises from the contract between vendor and purchaser, whereas the covenant for title is implied or expressed in the conveyance." In a recent judgment of this Court, not yet reported, in O.S. A. 32 of 1900 (*Seshachella Naicker v. Varadachariar*), XI M. L. J. R. 318, the above decision in I. L. R., 24 M. 233 was considered and followed. It was there explained that a recital in a sale-deed that the consideration had been paid to, and received by, the vendor cannot be construed as a contract to pay the consideration money; but that if the oral agreement or contract of sale which preceded

the actual sale had also been reduced to writing, as is very often the case, in the registered deed of sale itself, the case might be different and Art. 116 might apply. The appellant's pleader argues that the case in I.L.R., 24 M. 233 governs this case, because it was there held that Art. 116 did not apply to a suit for the recovery of purchase money notwithstanding that it is provided in section 55 (5) (b) of the Transfer of Property Act, that the buyer is bound to pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. The answer to this argument is furnished by section 55 (1) (d) of the Transfer of Property Act which provides that, in the absence of a contract to the contrary, the seller is bound to execute the conveyance only on payment or tender of the amount due in respect of the price. Though the payment of the purchase money has to be made at the time of completing the sale and in that sense the payment and the sale take place simultaneously, yet the payment immediately precedes the execution of the conveyance, whereas in the case of delivery of the property sold or leased to the vendee or lessee as the case may be, such delivery, in the absence of a contract to the contrary, has only to follow the completion of the sale or lease and not precede the same.

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In our opinion, therefore, the claim for damages for breach of the obligation to put plaintiff in possession of the villages is not barred by the law of limitation, and the only question which remains to be considered is the amount of damages to be awarded. The measure of damages is the amount of profits with interest thereon at 6 per cent. per annum which would have accrued to the plaintiff if he had been put in possession of the villages and was in enjoyment of the same during the term of the lease.

As the parties do not agree as to the amount of damage to be thus assessed, the District Judge will try the following issue on the evidence already on record, and such further evidence as may be adduced on both sides and submit his finding within six weeks from the date of receipt of this judgment:—

“What is the amount of net profits, with interest thereon, calculated as aforesaid, which the plaintiff would have derived from the villages leased to him, if he had been in possession of the villages during the term of the lease?”

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Venkata Subba Row ... Appellant*
(Plaintiff).

v.

Purushottam and others ... Respondents
(Defendants).

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Hindu Law—Lameness not congenital—Disqualification from inheritance.

Under the Hindu Law, lameness which is not congenital is no bar to inheritance.

Second appeal from the decree of the Subordinate Judge's Court of Kistna in A. S. No. 589 of 1899 presented against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 482 of 1896.

The plaintiff, undivided nephew of the defendant, brought this suit for possession of the plaint lands as having fallen to his share in an alleged division between him and the defendant, or in the alternative, for partition of the family properties in the event of the Court holding that there was no partition. The defendant denied the alleged partition and contended, among other pleas, that as the plaintiff was a lame man he was incapacitated from claiming any share. The District Munsif found that there was no partition as alleged; that the plaintiff would be entitled to claim partition as the lameness, not being congenital, was not a disqualification; but that as the plaintiff had omitted to bring into hotchpot all the properties in his possession, he was not entitled to maintain a suit for partial partition. He, therefore, dismissed the plaintiff's suit. The District Judge, however, on appeal held that there was a partial division and that the lands in plaintiff's possession were those which fell to him at such partition, that the other properties were not divided, that the plaintiff would be entitled to maintain a suit for division of such properties but for the fact that he was

* S. A. No. 713 of 1900.

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lame and that lameness, though not congenital, was a disqualification. He, therefore, affirmed the decree and dismissed the appeal. Hence this second appeal to the High Court.

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P. S. Sivaswami Aiyar and *P. Nagabhushanam* for appellant.

V. Ramesam for 1st respondent.

P. R. Sundara Aiyar for 2nd respondent.

The Court delivered the following

JUDGMENT :—Even assuming that under the Hindu Law texts, in case the lameness was congenital there would be a bar, a matter regarding which we give no opinion, it is admitted in the present case that the lameness was not congenital and that the plaintiff for years after his birth had the use of his limbs.

No case has been quoted where any court has held that lameness, congenital or otherwise, is a bar to inheritance. In the only case that has been quoted (*Futtick Chunder Chatterjee v. Juggut Mohinee Dabee*),¹ the decision proceeds upon the assumption that lameness would be no bar unless it were proved that the person proposed to be excluded was a cripple from birth. Such being the case, we cannot uphold the decision of the Subordinate Judge.

We must, therefore, set aside the decree of both courts and hold that there should be a partition and that the plaintiff is entitled to a one-half share in the lands and houses in Chinamutevi village (as per Schedule A) with costs throughout and mesne profits amounting to Rs. 126 for the three years prior to the suit, and subsequent mesne profits up to the date of delivery of the plaintiff's share after partition, such profits to be ascertained in execution.

1. 22 W. R. 348.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*.Ramasami Chettiar Petitioner*.
(1st Defendant).

v.

R. G. Orr and others Respondents.
(Plaintiffs).

Ramasami Chettiar
v.
R. G. Orr.

Civil Procedure Code, S. 622—Provincial Small Cause Courts Act (IX of 1887) S. 16 and Art. 31—Suit by landlord for breach of covenant in lease—Suit of a Small Cause nature—Exercise of jurisdiction by Court not vested in it by law—Interference of High Court.

A suit by a landlord for value of trees cut by his tenant on the land demised in breach of his covenant in the lease is a suit for damages for breach of covenant and as such is cognizable by a Court of Small Causes and is not exempted from its jurisdiction by Art. 31 as a suit for profits of immoveable property belonging to plaintiff but wrongfully received by defendant.

The objection as to jurisdiction can neither be given up by consent nor waived.

The High Court when asked to exercise its jurisdiction under S. 622, C.P. C., must give effect to a plea that the suit was not triable by the ordinary courts but only by a court having jurisdiction as Court of Small Causes, though the point was taken for the first time before it, without any reference to the merits of the case.

Petition under section 622 of the Civil Procedure Code praying the High Court to revise the decrees of the Subordinate Judge's Court of Madura (West) in A. S. Nos. 401 and 387 of 1900, presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 228 of 1898.

K. Srinivasa Aiyangar for V. Krishnaswami Aiyar for petitioner.

P. S. Sivaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT:—In this case the defendants are the tenants of the plaintiffs under an agreement, dated 10th April 1889, Exhibit A in this case. The first paragraph of the agreement recites that the plaintiffs had leased to the defendants certain villages at a certain rent. The third paragraph of the agreement states that "you (meaning the plaintiffs) have authorised us (the defendants) to enjoy all your rights in the said villages for the said period of 19 years including certain rights to which you (the plaintiffs) are entitled in the Zemindari." The lease agreement contains this covenant "we (the defendants) shall not cut nor shall permit any one

* O. R. P. Nos. 200 and 201 of 1901.

25th February 1902.

to cut the trees which have been already taxed or which are liable to be taxed or which are growing in the Zemindari forests. The rights of the plaintiffs referred to in paragraph 3 of the agreement have to be ascertained by reference to the agreement between the plaintiffs and the Zemindar. By a supplemental agreement between the plaintiffs and the Zemindar which is Exhibit II in the case, the parties covenanted in the following terms :—"The lessees (plaintiffs) may cut green trees standing in beds of tanks for their own use and may also cut green trees in other places for agricultural purposes as well as cut at their option all trees planted by themselves and are further entitled to take for their own use all decayed and fallen trees, but the lessor may cut firewood for the use of his own personal household." The present suit was brought by the plaintiffs against the defendants to recover a sum of Rs. 20 which was alleged to be the value of 9 trees which the defendants were alleged to have cut and carried away. The prayer in the plaint is a prayer for a decree for the value of the trees cut and carried away. The suit was instituted on the ordinary side of the Court of First Instance, and no objection was taken that it was not competent for the court on its ordinary side to entertain the suit. There was an appeal, and no objection was taken by the defendants to the jurisdiction of the court. The point is now raised by the defendants that this is a suit which is cognizable by a Court of Small Causes. Section 16 of the Provincial Small Cause Courts Act is in these terms :—"Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable." It has been argued by Mr. *Sivaswami Aiyar* on behalf of the plaintiffs that this suit is not a suit which is cognizable by a Court of Small Causes. He says that the suit falls within the words of Article 31 of the schedule to the Provincial Small Cause Courts Act. These words are "any other suit for an account including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiffs which have been wrongfully received by the defendants." I find it impossible to construe the words of that article as applying to a suit of the

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kind now before me. It seems to me to be perfectly clear, I should have said beyond argument, if it had not been for the ingenious argument addressed to me by Mr. *Sivaswami Aiyar*, that this is a suit for damages for breach of covenant, and it is impossible to regard the suit as a suit for profits of immoveable property which have been wrongfully received by the defendants. That being so, I am bound to hold that the Court before which this suit was instituted had no jurisdiction to entertain the suit. It is perfectly clear that the objection as to jurisdiction cannot be given up by consent, nor can it be waived. This is well settled law, and it was so laid down in express terms by the Privy Council in *Minakshi Naidu v. Subramanya*¹.

Then, the further question arises, am I bound to interfere and exercise the powers which are conferred on the High Court by section 622 of the Code of Civil Procedure. Mr. *Sivaswami Aiyar* has argued that I am not bound to exercise those powers and that I ought not to interfere in the special circumstances of this case. He referred to two authorities in support of the proposition that I ought not to interfere unless I am satisfied that injustice has been done. The two cases to which he referred are *Nathekha Valad Bhekhankha v. Abdul Alli*,² and *Ghasiti v. Umrao Jau*.³ These cases have really no bearing upon the point I have to consider. It seems to me that if I am satisfied that the Court of First Instance or the Court of Appeal exercised a jurisdiction not vested in it by law, I am bound to interfere and exercise the powers conferred by the section. I am driven to hold that the courts in this case have exercised a jurisdiction not vested in them by law. I confess I would be glad to find some mode of escape; but, in my opinion, I have no alternative but to set aside all the proceedings in this suit and to direct that the plaint be returned for presentation to the proper court. I make no order as to costs of these petitions.

1. I. L. R. 11 M. 26.

2. I. L. R. 18 B. 449.

3. I. L. R. 21 C. 152. The reference seems to be wrong. There is another case at p. 249 in the same volume which seems, however, to be in point—ED.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ramaswamy Bhagavathar ... Appellant*
(Plaintiff.)

v.

Sundararaja Chetti and another ... Respondents.
(5th and 6th
Defendants).

Negotiable Instruments Act (XXVI of 1881) Ss. 30, 94, 98, (c) and (e) and 106— Ramaswamy
Contract Act S 134—Notice of dishonor—Reasonable notice—Liability of drawer. Bhagavathar
v.

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The general rule laid down by S. 30 of the Negotiable Instruments Act is that a drawer of a bill of exchange is bound in case of dishonor by the drawee or acceptor to compensate the holder provided due notice of dishonor has been given to or received by the drawer. Such notice must be given in the manner prescribed by S. 94 and within a reasonable time as required by S. 106. S. 98 (c) is an exception to the above general rule and the holder relying upon the exception must allege and prove that no damage could have been suffered by the drawer by reason of absence of notice, reasonable or otherwise. Where it was alleged that the drawer and acceptor were partners but the drawer did not draw the bill on behalf of himself and his partner and the holder gave notice to the drawer a year after dishonor.

Held, (1) that the notice was not reasonable.

(2) that section 98 (e) did not apply so as to dispense with notice to the drawer upon dishonor by the acceptor, the drawer's partner.

(3) that the drawer was not liable, there being no allegation that he could not suffer damage. The fact that the holder is barred by limitation from bringing a suit against the acceptor does not discharge the drawer from liability within the meaning of S. 134, Contract Act.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 408 of 1898, presented against the decree of the Court of the District Munsif of Negapatam in O. S. No. 329 of 1896.

The first respondent, 5th defendant, drew on 4th June 1893 a hundi in favor of the 1st defendant upon the 2nd respondent (6th defendant) alleged to be a partner of the 1st respondent for Rs. 575 payable at Rangoon within 21 days after demand. 1st defendant endorsed the hundi to plaintiff who sent it to Rangoon and demanded the amount from 6th defendant but he refused to pay and

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returned the hundi to plaintiff. He gave notice of dishonor to 1st defendant in November 1894 a year after the due date. The plaintiff impleaded the 2nd defendant as alleged partner of 1st defendant and the sons of the 2nd defendant as the 3rd and 4th defendants and claimed to get a decree against all. Various pleas were raised by the several defendants, chief among them being that no notice of dishonor was given and, if given, it was not within a reasonable time. A special plea was raised by the 1st and 5th defendants that they were discharged as the act of the plaintiff in instituting the suit after limitation operated as a discharge of the obligation of the principal debtors. The District Munsif held that the 1st defendant can only be taken as surety and that as the 6th defendant was discharged from liability by reason of the suit being barred against him, the 1st defendant, the surety was also discharged, that the 2nd defendant was not a partner and was not liable for the plaintiff's claim at all, that though the notice given to 5th defendant (5—11—92) was unreasonable under the circumstances, notice of dishonor was not necessary in his case and that as he was the principal debtor himself he was not discharged. He gave, therefore, a decree against the 5th defendant. On appeal by the latter the sub-judge held that there was no promise to pay by 5th defendant as contemplated by section 98 cl. (g) of the Negotiable Instruments Act that as the 5th defendant had no timely notice of dishonour he was discharged and that as the 6th defendant was discharged from liability 8th defendant was also discharged. He, therefore, dismissed the plaintiff's suit with costs. Hence this second appeal.

V. Krishnaswami Aiyar and K. Ramachandra Aiyar for appellant.

V. C. Desikachariar for 1st respondent.

The Court delivered the following

JUDGMENT:—In support of this second appeal it is urged that the plaintiff (appellant) is entitled to a decree against the 5th defendant (the 1st respondent), firstly, because the 5th defendant has not proved that he suffered any damages for want of notice of dishonour of the bill, secondly, because no notice of dishonour is necessary, since the 5th defendant, the drawer, and the 6th defendant, the drawer and acceptor, are partners, and thirdly, because

the 5th defendant received notice of dishonour of the bill by the acceptor, within the meaning of section 30 of the Negotiable Instruments Act.

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The 1st contention is governed by section 98(c) of the Negotiable Instruments Act which runs as follows:—"No notice of dishonour is necessary when the parties charged could not suffer damage for want of notice". It is clear that the onus is upon the plaintiff who relies upon this exception to the general rule enacted by section 30, that the drawer of a bill of exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder provided due notice of dishonour has been given to or received by the drawer, to establish and prove that the 5th defendant could not have suffered damage by reason of notice not having been given to him of the dishonour of the bill by the 6th defendant (*Moti Lal v. Moti Lal*¹). The plaintiff did not allege in the plaint that the 5th defendant could not suffer damage for want of notice, nor has any such issue been raised and proved.

In support of the 2nd contention, the learned pleader for the appellant relies on the English case of *Porthouse v. Parker*². The decision in that case is virtually reproduced in section 98 (a) of the Negotiable Instruments Act which runs as follows:—

"No notice of dishonour is necessary to charge the drawers when the acceptor is also a drawer."

In that case, the bill was drawn by one Wood, as the agent of George, James and John Parker on John Parker. The bill was accepted by a certain person as the agent of John Parker on his account. It was held that there was sufficient evidence of its having been regularly drawn and further that the acceptor being likewise a drawer and having dishonoured the same, that must necessarily have been known to him and as he was one of the three drawers, the knowledge of one was the knowledge of all and that, therefore, it was not necessary to give notice of dishonour. Assuming as alleged by the plaintiff that the 5th and 6th defendants are partners which allegation is denied by both of them, it is not alleged in the plaint, nor is it proved that the 5th defendant drew the bill in question both on behalf of himself and the 6th defendant. The mere fact that the drawer and the drawee happen to be partners

1. I. L. B. & A. 78.

2. 10 R. R., 637.

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cannot lead to any presumption that they are partners in respect of the drawing of the bill or that the bill was drawn up by one of them on behalf of both. Even assuming that within the meaning of section 98 (e) and the definition of the word 'drawer' a person can be regarded as the drawer of a bill of exchange, when his name does not appear on the face of it, either individually, or collectively as included in the name of the firm, the present case does not fall within the principle of the above decision and cl. (e) of section 98.

As regard the 3rd contention, it is impossible to hold upon the facts found by the Sub-Judge, that the 5th defendant was given or received notice of dishonour within the meaning of section 30, in the manner prescribed by section 94, or within a reasonable time as required by section 106.

The Subordinate Judge has dismissed the plaintiff's claim against the 5th defendant also for another reason, *viz.*, that as the suit was barred against the 6th defendant, the acceptor who was joined as a party to the suit, after the expiration of the period of limitation, the 5th defendant was also, therefore, discharged under section 134 of the Indian Contract Act. We may point out that this is clearly erroneous. If the suit be within time against the 5th defendant, the fact that it is barred by limitation as against the 6th defendant cannot operate as a discharge of the 5th defendant's obligation.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Jayanti Subbiah	...	...	Appellant *
			(Plaintiff.)

v.			
Mangamma	...	...	Respondent
			(Defendant).

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Hindu Law—Widow's right to maintenance (including residence)—Nature of right
—Purchaser how far affected by such right—Widow claiming by right of inheritance—
Priority of debts—Obligation incurred as surety binding on the widow—Transfer of
Property Act 8.39.—

Under the Hindu Law, maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of that relation and quite independent of the possession by the husband of any property, ancestral or self-acquired.

The widow of a deceased co-parcener has a right of maintenance against the Jayanti surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners. This right to maintenance does not constitute in itself a charge, though it may be enforced against a transferee of joint family property under the circumstances set out in S. 39, Transfer of Property Act. Where it is necessary to preserve this right effectually it may (by proper proceedings) be made a specific charge on a reasonable portion of the joint family property—such portion not exceeding her husband's share therein.

A person's debts must have priority over his widow's maintenance and a widow taking her husband's estate on the latter's death without male issue has no right of maintenance apart from her right of inheritance and administering the estate as heir. She takes only what remains after payment of her husband's debts. All debts which would bind the husband personally are necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. A debt incurred by a person as surety is binding as a family debt upon his undivided son and *a fortiori* his wife cannot impugn such debt.

Where, therefore, in execution of a decree obtained by the creditor against his debtor in respect of an obligation incurred by the latter as surety the decree-holder attached a house and bought it himself in court auction and applied to be placed in possession and the debtor's representative, the widow, claimed that she had a right of residence and that she could not be ejected:—

Held:—that the widow had no right of residence in priority to the right of her husband's creditors to be paid out of the assets and to realize their dues out of the estate if not paid and that the surety debt was a family debt which would bind the widow and defeat her right of maintenance including residence.

Appeal from the order of the District Court of Bellary, dated 25th July 1901, in C. M. P. No. 77 of 1901, connected with E. P. No. 29 of 1895 and M. P. No. 26 of 1901, A. S. No. 16 of 1892 on the file of the Subordinate Judge's Court of Bellary.

A. T. Ambrose for appellant.

Dr. S. Swaminadhan for respondent.

The Court delivered the following

JUDGMENT:—*Bhashyam Aiyangar, J.*:—The appellant is the decree-holder in A. S. No. 16 of 1892, which he brought on a promissory note made by the deceased Naranappa against his widow and legal representative, the respondent. In execution of that decree he attached and became the purchaser of the house of the deceased Naranappa, in which the widow, the respondent, had been and was living at the time of the purchase. When he proceeded to obtain delivery of the house under section 318 of the Civil Procedure

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Code, he was resisted under section 334 by the respondent on the ground that she had a right of residence during her lifetime, and that she could not, therefore, be ejected from the residential portion of the house. The District Judge upheld her contention holding that Naranappa's liability under the pro-note was incurred by him only as a surety for certain debts owing by certain relations of his to the appellant, and that it was, therefore, not incurred for the benefit of the family consisting only of Naranappa and his wife, the respondent. We are unable to follow the reasoning of the District Judge. The family consisted only of the husband and wife, and all debts which would bind the husband personally are necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. Even if the family had been an undivided family consisting of father and son, a debt incurred by the father only as surety and not for the benefit of the family, would bind the whole of the joint family property which may have devolved upon the son by right of survivorship,¹ and it is difficult to see on what principle the District Judge holds that the debt is not a family debt. Under the Hindu Law the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired² and his debts take precedence of her claim for maintenance³. The District Judge relies in support of his decision upon the cases of *Venkatammal v. Andypapa*,⁴ and *Ramanadan v. Rangammal*⁵. He appears to have misapprehended the principle of those decisions. When an undivided Hindu family consists of two or more males related as father and son or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners, and though such right does not in itself form a charge upon

1. *Hitaramayya v. Venkatramanna*, 1 L. R., 11 M. p. 378, *Tularambhat v. Gangaram*, 1 L. R. 23 B. 454.

2. (Mayne's Hindu Law and Usage, 6th Edition, paragraphs 451 and 455; *Savitribai v. Laxmibai and Sadasiv Ganoba*, 1 L. R., 2 B. 573 at pp 597 and 598).

3. (Mayne's Hindu Law, paragraph 464).

4. 1 L. R., 6 M. p. 130.

5. 1 L. R., 12 M. p. 260.

her husband's share or interest in the joint family property, yet, when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein (I. L. R. 12 M. 260 at p. 268). Such right may also in certain cases be enforced against the transferee of joint family property (*vide* section 39 of the Transfer of Property Act). In the 6 Madras Series case, the son after the death of the father incurred considerable debts, and on mortgage bonds executed by him suits were brought and the properties brought to sale in execution of decrees passed in such suits. It was not shown that the debts were incurred for purposes which would bind his mother, who on the death of her husband, had a right of maintenance against her son *quoad* the share of her husband in the joint family property which the son mortgaged for a debt of his own and which was brought to sale for realization of such debt. It was held that the house must be sold subject to her right to continue to reside in the house which she had been occupying till then. In the 12 Madras Series case, the question was considered by a Full Bench. In that case the undivided family consisted of a father, sons and grandsons, and on the death of the father, the sons or some of them contracted a debt, and in execution of a decree passed against the sons and grandsons for the recovery of such debt, the house in which the widow of the father was living was sold. An issue was sent as to the nature of the debt, and it was found that the debt was incurred for the benefit of the whole family, and no objection was taken to that finding. The judges were unanimous in holding that the widow of the father had no right as against the purchaser to reside in the house of her late husband's family. *Muthusami Iyer, J.*, observed as follows:—"I am also of opinion that the purchase is valid as against the respondent. It is found that the judgment-debt is a family debt, and I take it that the debt, though contracted only by the male co-parceners, was contracted by them, not for their exclusive benefit, but for the benefit generally of the joint family consisting of themselves and their mother. A sale for the payment of her own debt would bind her interest in the house whatever it might be, and the decree in O. S. No. 3 of 1882 was one which executed the hypothecation of 1875, and which was passed against the representatives of

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the joint family. In these circumstances, the respondent is not entitled to set aside the sale unless she shows that the debt which has led to it is not binding upon her." He then distinguishes the case in 6 Madras Series, p. 130, on the ground that there was no finding in that case that the debt was a family debt, "that is to say, a debt contracted for the joint benefit of the mother and her sons." A debt contracted by the husband himself, as in the present case, is necessarily binding upon her, and on his death without male issue his estate devolves upon her by right of inheritance, in the absence of any undivided kinsmen of his. It is a mistake under such circumstances to regard her as having a right of maintenance (which includes right of residence) against her husband's estate. She takes it as heir and must administer it as such. It is only the residue that is left after discharging her husband's debts that will belong to her. During her husband's lifetime she had no doubt a right of maintenance against him, but that was only a matter of personal obligation on the part of the husband, quite independent of the possession of any property and it did not form a charge upon his property. *Kernan, J.* in the Full Bench case, states that "if the debt in respect of which the sale took place, was a debt due by her husband no doubt could be entertained that she had no such right. The only doubt there could be, as it appears to me, is whether her right to reside in the house had not accrued as against the manager who succeeded her husband, and whether such manager could have, by any act of his, voluntarily affected her right. However, the finding is that the debt incurred by the manager was for the benefit of the family." The italics in the above quotation are mine. In *Dalsukhram Mahasukhram v. Lallubhai Motichand* ¹ the father left not only a widow but a son who sold the house. It was held that the sale will be subject to the right of the widow to continue to reside therein, it being found that there were no proper reasons for the alienation by the son and that the purchaser bought the house admittedly with full knowledge that the widow was residing therein. In *Bhikham Das v. Pura* ² the owner of the dwelling house who mortgaged the same died leaving him surviving his wife and mother. In a suit brought against both of them after the death of the mortgagor, to enforce the mortgage, it was held that it could be enforced by sale of the

1. I. L. R. 7 B. 282.

2. I. L. R. 2 A. 141.

dwelling house. Apparently, it was left an open question as to whether the widow (mother?) could be ousted by the auction purchaser? If the dwelling house devolved upon the mortgagor from his father who left surviving him his widow, the mortgagor's mother, her right of residence could not be defeated by a sale made in satisfaction of a debt which was not incurred by the son for a purpose which would bind also his mother. In the case reported in *Manilal v. Bai Tara* ¹ the house was mortgaged by the husband in his lifetime and in execution of a decree enforcing such mortgage, it was sold and purchased by the defendant with knowledge that the mortgagor's widow was residing in the house at the time of the court-sale. In a suit brought by the widow to establish her right to continue to reside during her lifetime in the house, her claim was negatived in the absence "of any allegation that the mortgage effected by the plaintiff's husband was not for the family advantage or was in any way in fraud of her rights." It does not appear from the report of the case whether there was any male member of the family other than the husband. If it is to be implied from the decision in that case that, in the view of the learned judges who decided it unless the husband's debt was incurred for a purpose which would be beneficial to and binding upon his wife, she would have a right to continue to reside in the house after it is sold in satisfaction of the debt owing by her husband, I am unable to concur in that view. The appeal is, therefore, allowed and the order of the District Judge is modified by directing that the respondent be ejected also from that portion of the house purchased by the appellant in which she has been residing.

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The order of the District Judge is affirmed in other respects. Each party will bear his or her own costs of this appeal.

Benson, J.—I concur.

¹. I. L. R. 17 B. 398.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*.

Ramanathan Chettiar

.. Petitioner*
(*Petitioner*).

v.

Subramania Sastrial and others

... Respondents
(*Ctr.-Petitioners*).

Ramanathan Chettiar : *Civil Procedure Code, S. 295—Same judgment-debtor—Sale of several items—Payment of sale proceeds—Assets realized.*

v.
Subramania
Sastrial.

Where one judgment-creditor obtained a decree against the father and son and in execution attached 4 items of ancestral properties and the latter were sold, and before the sale proceeds of 2 items had been paid into court and after the sale proceeds of the other 2 items had been paid, another judgment-creditor who had obtained a decree against the father only applied under S. 295 for rateable distribution.

Held (1) that the judgment-debtor in both the cases are the same within the meaning of S. 295, Civil Procedure Code, and (2) that the assets could be said to have been realized only when the whole of the proceeds of all the items were paid in court and, therefore, the 2nd judgment-debtor was entitled to rateable distribution of the sale proceeds of all items.

Petition under S. 622 of the Civil Procedure Code, praying the High Court to revise the order of the Subordinate Judge's Court of Kumbakonam, dated 22nd November 1900, in C. M. P. No. 880 of 1900 (O. S. No. 11 of 1899.)

V. C. Desikacharian for petitioner.

T. R. Venkatarama Sastri for 1st, 2nd and 6th respondents.

The Court delivered the following

JUDGMENT :—This is a petition against an order for rateable distribution made under section 295, Code of Civil Procedure. For the sake of convenience, I will refer to the judgment-creditor at whose instance the land was sold in execution as judgment-creditor No. 1 and to the judgment-creditor who made the application to the Subordinate Judge's Court, under section 295 and who is the petitioner before this court as judgment-creditor No. 2. The land which was sold in execution at the instance of judgment-creditor No. 1 was sold in parcels, or in four items, and it would seem that

these four items exhaust the whole land which was sold in execution of the decree in question. Now judgment-creditor No. II, put in his application under S. 295, C. P. C., before the proceeds of the sale of items 3 and 4 had been paid into court, and after the proceeds of the sale of items 1 and 2 had been paid into court; and in this state of things the Subordinate Judge held that as regards the proceeds of the sale of items Nos. 3 and 4, the petitioner was entitled to participate by way of rateable distribution together with judgment-creditor No. 1, but as regards the sale proceeds of items Nos. 1 and 2, he held that he was not entitled to participate because his application was made after the sale proceeds of these two items had been paid into court. Now, in so holding I cannot help thinking that he was wrong. The question of course turns upon the construction of section 295, C. P. C. It seems to me that the word 'assets' in section 295 means the proceeds of the sale of the property which is sold in execution of the decree. As far as the present case is concerned, I am of opinion that the assets were realized when the whole of the proceeds were paid into court. At the time the petitioner-judgment-creditor No. II applied under section 295, C. P. C., in my opinion, the assets had not been realised for the purposes of the section. Only a portion of the assets had been realised. It seems to me therefore that as regards items Nos. 1 and 2 as well as regards the proceeds of items Nos. 3 and 4, the application can fairly be said to have been made prior to the realization of the proceeds of the property, which was sold in execution of the decree. This appears to me to be a reasonable construction to place upon the words. It certainly does not do violence to the express terms of the section, and I do not read the judgment in *Tiruchittambala Chetti v. Seshayyengar*,¹ as precluding me from adopting this construction. I decide this case upon the facts which appear on the record or which were admitted in the course of the argument, and I esodoid you op to consider the general question of construction which was raised in *Hafez Mahomed Ali Khan v. Damodar Pramanick*.² It is not necessary for me to say whether I should be disposed to adopt the construction which the Calcutta High Court as a general question of construction placed upon the words "when ever assets are realized." In my judgment the petitioner is entitled

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1. I. L. R., 4 M. 383.

2. I. L. R., 18 C. 242.

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to participate in the sale proceeds of items Nos. 1 and 2 as well as of items Nos. 3 and 4, and I think the case must go back to the Subordinate Judge with a direction that he must deal with it upon that footing. Now, it has been further argued on behalf of judgment-creditor No. 1 that the order made on the application of judgment-creditor No. 2 is bad in its entirety on the ground that the judgment-debtor of judgment-creditor No. 1 is not the same judgment-debtor of judgment-creditor No. 2 within the meaning of the words 'judgment debtor' as they occur in section 295, C. P. C. Now, it is proved or admitted that judgment-creditor No. 2's decree is against the father, and the judgment-creditor No. 1's decree is against the father and son, and it is admitted that the property from which the assets were realized by the sale, was the ancestral property of the family, of which the father and the son are undivided members; and in that state of things the Subordinate Judge has held that the judgment-debtors are the same for the purposes of section 295 of the Code, and I think he was right in so holding. I do not say that this point is precisely covered by the decision of this court in *Grant v. Subramaniam*,¹ but that case certainly seems to me to go a long way towards establishing the contention which is relied upon on behalf of judgment-creditor No. 2, the petitioner in this case. Then, with regard to the Bombay cases, I think they can all be distinguished. As regards *Nimbaji Tulsiram v. Vadia Venkati*,² the property attached was not the ancestral property of the defendants in the two suits. In the present case it is the ancestral property. Then, again, in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*,³ there was one decree against the father and another against the son. Here we have a decree against the father and a decree against the father and the son. It seems to me, therefore, as I have said, the Subordinate Judge was right in holding that the judgment-debtors were the same for the purpose of section 295, C. P. C., I have dealt with this question; but I think it is extremely doubtful whether it is competent for judgment-creditor No. 1 to raise the point at all now without having made a substantive application for the revision of the order made by the Subordinate Judge, and which is recited in the order now before this court as an order made by him on petition No. 761 of 1900.

1. I. L. R., 22 M. 241.

2. I. L. R., 16 B. 683.

3. I. L. R., 25 B. 494.

As regards the main point which has been argued in this revision petition, it is not altogether free from doubt, and authorities on the point are not uniform. In that state of things I do not consider it necessary that I should make any order with regard to the costs of this petition, but the result will be, the case will have to go back to the Subordinate Judge with the direction that he must deal with it on the footing that the petitioner is entitled to participate in the sale proceeds of items Nos. 1 and 2 as well as items Nos. 3, and 4.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Mallikarjanudu Setti... Appellant*
(*Cr-petitioner*).

v.

Lingamurti Pantulu... Respondent
(*Petitioner*).

Civil Procedure Code, S 310 A—Mortgage decree, sale in execution of—Second mortgagee no party, not entitled to apply.

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Sec. 310-A is applicable to the case of a sale held in execution of a mortgage decree.

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A person whose interest is not sold and cannot have passed under the sale is not entitled to apply under sec. 310-A.

Where therefore a *pursne* mortgagee applied under sec. 310-A, to set aside the sale held in execution of a decree obtained by a prior mortgagee but to which the former was no party:—

Held that such *pursne* mortgagee had no *locus standi* to apply under sec. 310 A.

Appeal from the order of the District Court of Ganjam at Berhampore, dated the 6th August 1900, passed in C. M. A. No. 9 of 1900, presented against the order of the Court of the District Munsif of Sompeta, dated the 28th December 1899, passed in M. P. No. 1713 of 1899 (E. P. No. 458 of 1899; O. S. No. 567 of 1898).

* A. A. A. O. No. 35 of 1901,

17th April 1902.

C. R. P. 340 of 1900 amended as A. A. A. O. No. 35 of 1901 as per order of this Court on 24—4—1901.

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Pantulu.

P. S. Sivaswami Aiyar for appellant.

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—Following the opinion of the Full Bench, we hold that the provisions of S. 310 A. of the Civil Procedure Code are applicable to a sale of mortgaged property sold under a mortgage decree; but in the present case the applicant under S. 310-A is a second mortgagee who was not made a party to the suit. This interest, therefore, could not have passed under the sale which he seeks to set aside under S. 310 A, for his right to redeem the prior mortgage will continue notwithstanding the decree and the sale thereunder.

We hold, therefore, that he is not a person whose immoveable property has been sold within the meaning of S. 310-A. He has, therefore, no *locus standi* to apply under that section.

We set aside the order of the lower appellate Court and restore that of the District Munsif, but on the ground stated above.

Each party will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Krishnama Chariar Appellant*
(*Ctr-petr. 2nd*
plaintiff).

v.
Appasami Moodaliar and another ... Respondents*
(*Petitioners-trans-*
feree plaintiffs).

Krishnama Chariar v. Appasami Moodaliar. *Civil Procedure Code, Ss. 233 and 244 (last clause)—Representative of decree holder, order determining, appealable.*

An order determining whether a party applying for execution is or is not the representative of the decree-holder is appealable under the last clause of S. 244, Civil Procedure Code.

Sambasiva v. Srinivasa, 2 explained and distinguished.

Badri Narain v. Jai Kishen Das, 3 and *Manickam v. Tatayya*, 4 followed.

Appeal from the order of the District Court of North Arcot in C. M. A. No. 13 of 1900, presented against the order of the

A. A. A. O. No. 32 of 1901.

3rd December 1901.

1 Vide *Mallikarjanudu Setti v. Lingamurti Pantulu & Co.*, I. L. R., 25 M. 244.

2 I. L. R., 12 M. 511 3 I. L. R., 16 A. 483 4 I. L. R., 21 M. 388.

court of the District Munsif of Sholinghur, on E. P. No. 1494 of Krishnama Chariar
1900 in O. S. No. 353 of 1888.

The original plaintiff Kristnamachariar and two others, since deceased, as trustees of Irawateeswarar temple in Ammoor village, obtained a mortgage decree in O. S. 353 of 1888 in the District Munsif's Court at Sholinghur against defendants. Various proceedings were taken by the original plaintiffs and after the death of the two trustees by Krishnamachari, the 2nd plaintiff, but some 20 days before the present application in question, he was dismissed by the committee and in his place, two persons, Appasawmi Mudali and Muni-sawmi Mudali, were appointed as trustees. These persons now applied for execution and prayed that the court might order notice of transfer under S. 232, C. P. C., to be sent to 2nd plaintiff and defendants and also for transfer, under S. 223, C. P. C., of the decree for execution to the District Munsif's Court of Conjeeveram.

The Munsif removed the name of the 2nd plaintiff and allowed execution to proceed at the instance of the new trustees.

On appeal by the original 2nd plaintiff, the District Judge of North Arcot held that there was no appeal against an order under S. 232, Civil Procedure Code. Hence this second appeal.

Mr. V. Krishnasami Iyar for appellant.

The respondent was not represented.

The Court delivered the following

JUDGMENT :—The decision in *Sambasiva v. Srinivasa*¹ by which the District Judge considered himself bound, was not passed with reference to the last clause of section 244 of the Civil Procedure Code which clause was added by Act VII of 1888. The effect of the amendment was considered in *Manikkam v. Tatayya*² and the decision in *Badri Narain v. Jai Kishen Das*³ was referred to with approval as deciding the question. We are of opinion that the effect of the amendment is to give the right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree-holder.

We allow this second appeal with costs and remand the appeal to the District Judge for disposal according to law.

1. I. L. R., 12 M. 511. 2. I. L. R., 21 M. 388 (390). 3. I. L. R., 16 A. 483.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, and Mr. Justice Bhashyam Iyengar.

Punithavelu Mudaliar

... Appellant*
(Plaintiff).

v.

Bhashyam Aiyangar, and another ... Respondents (Defendant and his legal representative).

Punithavelu Mudaliar v. Bhashyam Aiyangar. *Letters Patent, S. 12—Judgment—Indian Insolvency Act, 1848, S. 23—Reputed ownership clause—Charge-holder—Notice—Suit upon charge—Civil Procedure Code, Ss. 32, 279, 280, 333 and 372—Adjudication after insolvency—Official Assignee, made party.*

An order by a single judge dismissing an application by the judgment-creditor of an insolvent that a sum in the hands of the Official Assignee attached in execution of the decree obtained by the judgment-creditor against the insolvent be paid over to the judgment-creditor is a judgment within the meaning of Section 15 of the Letters Patent and is appealable.

Per Arnold White, C. J.:—

A chose in action and especially one which is a debt due to the insolvent in his trade or business comes within the words "goods and chattels" in S. 23 of the Indian Insolvency Act, 1848.

The English Bankruptcy Acts and the Indian Act compared.

The doctrine of reputed ownership does not apply unless there is a real owner as distinct from the apparent owner. The 'true owner' for the purposes of section 23 of the Indian Insolvency Act is the person who is entitled to determine the appearance of the beneficial interest.

An assignee in law or an assignee in equity, such as an equitable mortgagee, may be the true owner within the meaning of the section.

An instrument which merely creates a charge on future debts in favor of a person does not constitute the latter either an assignee in law or in equity. Such charge-holder is not the 'true owner' within the meaning of S. 23, Indian Insolvency Act, and the doctrine of reputed ownership has no application in such a case.

Where a notice is given by 'the true owner' preventing the party owing the debt from paying any one but the party giving the notice, such a notice takes the debt out of the operation of the section, that is, out of the order and disposition of the apparent owner.

Sec. 372, Civil Procedure Code, applies to the devolution of interest by operation of law or *in invitum*, and an Official Assignee in whom the rights of the insolvent are vested during the pendency of a suit can be properly made a party under Ss 32 and 372, Civil Procedure Code.

Miller v. Budh Singh, I. L. R., 18 C. 43 dissented from.

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The doctrine of *lis pendens* does not apply to a case where the subject-matter of the suit is not real property and is only moveable property or to a case where the devolution of interest is by operation of law and *in invitum*.

Per *Bhashyam Iyengar*, J. :—

The expression "true owner" occurring in S. 23 is not used in any technical sense but only as indicating the person who for all practical purposes is the real and substantial owner of the goods and chattels. A charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as the mortgagee thereof, and if either of them allows the mortgagor or the person creating the charge, to remain in possession of the goods and chattels, under circumstances which will lead to his being 'reputed' as owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee.

A mere charge or hypothecation is treated as an equitable assignment.

The definition of charge by *Day*, J in *Burlinson v. Hall* 12 Q. B. D. 347 approved.

Tennant v. Trenchard L. R. 4 Ch. App. 537 at pp. 543 and 544 referred to.

A notice by a person having a charge on a debt intimating his right to the debtor is sufficient to take the debt out of the order and disposition of the insolvent. *Talby v. Official Receiver*, L. R. 13 A. C. 523 followed.

A suit by the holder of the charge against the person creating the charge to enforce such charge has also the same effect. *Burlinson v. Hall* 12 Q. B. D. 347 referred to.

Where a person is adjudicated an insolvent pending a suit brought against him, which is purely an action '*in personam*', the Official Assignee is not a proper party. S. 372, Civil Procedure Code, has no relation to such a case as the section only relates to the case of an assignment pending suit of an interest in the subject matter of the suit.

Miller v. Budh Singh, I. L. R., 18 C. 43 and *Chandmull v. Ranee Soondery Dossee*, I. L. R., 22 C. 259 approved.

A charge-holder of a debt who has obtained a mere money decree is prevented by the principle laid down in S. 99 of the Transfer of Property Act from bringing the debt to sale in execution of a money decree but can bring it to sale only in enforcement of the charge.

An attachment after the vesting order of an amount in the hands of the Official Assignee representing a debt collected by him upon which a charge has been created in favour of the decree-holder must be released under S. 280, Civil Procedure Code.

Where a mortgagor or the person creating a charge becomes bankrupt pending a suit against him by the mortgagee or charge-holder upon such mortgage or charge a decree for foreclosure or redemption in the absence of the trustee in bankruptcy or Official Assignee is not binding upon the latter.

Wood v. Surr, 19 Beav. 551 followed.

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The doctrine of *Lis Pendens* has no application to personal property *Wigram v. Buckley* [1894], 3 Ch. 483 followed.

Where, therefore, the plaintiff got a document which purported to mortgage all the mortgagor's stock-in-trade, existing and future debts, &c., but there were no words transferring to the plaintiff the ownership or any interest in the chattels and the ownership and the right to possession was reserved by the mortgagor, the plaintiff having only a right to inspect the books of account &c., but having no right to take possession and he brought a suit upon his mortgage against the mortgagor who was adjudicated an insolvent pending suit and, without making the Official Assignee a party, obtained a decree against the insolvent and in execution attached a sum in the hands of the Official Assignee representing a debt due to the insolvent and collected by the Official Assignee but to which the plaintiff had a right under his document.

Held (1) that the document created only a charge in respect of the goods and chattels comprised under it,

and (2) that the plaintiff was not entitled in execution of his decree against the insolvent to get the sum in the hands of the Official Assignee.

Per *Arnold White*, C. J.:—The plaintiff has the rights of a secured creditor in the insolvency and will be entitled to enforce those rights if he adopts the proper procedure.

Appeal from the order, dated 18th December 1900, of the High Court of Judicature at Madras in the exercise of its ordinary original civil jurisdiction made in Civil Suit No. 143 of 1899.

Mr. P. R. Sundara Aiyar for *Mr. V. Krishnasami Aiyar* for the Appellant.

The Official Assignee in person.

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—This is an appeal from an order of *Boddam*, J., dismissing an application by a judgment-creditor of an insolvent for an order that a sum of Rs. 3,400 in the hands of the Official Assignee should be paid by the Official Assignee to the judgment-creditor (the appellant).

A preliminary objection was taken by the Official Assignee that no appeal lay from the order of the learned Judge. I think the order is a "Judgment" within the meaning of article 15 of the Letters Patent and that the preliminary objection should be overruled.

The facts are these. By an instrument, dated 13th March 1897, one C. Bhashyam Aiyangar, who was afterwards adjudged an in-

solvent, in consideration of a sum of Rs. 5,600 found due from him to the appellant on a settlement of accounts, covenanted to repay this sum to the appellant in quarterly instalments and mortgaged to the appellant his stock-in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to the mortgagor. The deed also provided that so long as the principal and interest remained unpaid the mortgagee should be permitted to inspect the books of account and other stock and effects and property of mortgagor. The mortgagor remained in possession.

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On July 25th, 1899, the appellant brought a suit (143 of 1899) against Bhashyam Aiyangar on his mortgage deed. In August 1899, upon an *ex parte* application by the appellant, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was afterwards dissolved. In the same month the appellant gave notice to Mr. Nelson who was indebted to the mortgagor in the sum of Rs. 4,000 that he, the appellant, claimed this sum under the mortgage as an outstanding due to the mortgagor.

On September 18th, 1899, C. Bhashyam Aiyangar was adjudged an insolvent and the usual vesting order was made.

On October 31st, 1899, the appellant obtained a decree in his suit by which the insolvent was directed to pay to him the principal and interest due under the mortgage deed, and in default of payment before January 31st, 1900, the mortgaged premises were ordered to be sold.

On February 6th, 1900, the sum of Rs. 3,400 referred to above was paid to the Official Assignee by Mr. Nelson, being a sum which had become due to the insolvent for goods supplied by him to Mr. Nelson as Principal of the Law College prior to Bhashyam Aiyangar's insolvency.

On September 25th, 1900, an order was made in suit No. 143 of 1899 directing that the decree should be executed by the attachment of the Rs. 4,000 in the hands of the Official Assignee. On December 7th, the appellant applied by summons in Suit No. 143 of 1899 for an order that the Official Assignee should pay over to the appellant this sum of Rs. 3,400. The learned Judge declined to make the order. I think he was right. I do not agree

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with the view of the learned Judge that the case came within Section 23 of the Insolvency Act. At the time of the insolvency the property in, and the possession of, the articles of furniture sold by the insolvent to Mr. Nelson had passed to Mr. Nelson. No question of reputed ownership, therefore, arises with reference to the actual goods. The question of reputed ownership arises in connection with the debt due from Mr. Nelson to the insolvent. It would seem that under the English Bankruptcy enactments prior to the Act of 1869, all choses in action were deemed to be included in the words "goods and chattels" (*Ryall v. Rowles*),¹ The English Act of 1869 provided [S. 15 (b)] that things in action other than debts due to the bankrupt in his trade or business were not goods and chattels within the meaning of the reputed ownership section and this provision was reproduced in the Act of 1883. It seems quite clear that a chose in action if it is a debt due to the insolvent in his trade or business comes within the words "goods and chattels" as contained in the Indian Enactment. Section 23 of the Indian Insolvency Act, 1848, is in substantially the same terms as Section 125 of the English Act of 1849 (12 and 13, Vict. Ch. 106) except that, under the English Act, the reputed ownership section empowered the Court to order that the property should be sold and disposed of for the benefit of the creditors under the bankruptcy, whilst under the Indian enactment property to which reputed ownership section applies is to be deemed to be the property of the insolvent and vests in the Official Assignee by operation of Section 7 of that enactment. In this respect the effect of Section 7 seems to be the same as that of Section 17 of the English Act of 1869 and of Sections 20 and 44 of the English Act of 1883.

The doctrine of reputed ownership does not of course apply unless there is a real owner distinct from the apparent owner (*Hamilton v. Bell*², *Reynolds v. Bowley*³). For the purposes of the section the "true owner" is the person who is entitled to determine the appearance of beneficial interest. It is not necessary that he should be an assignee in law. An equitable mortgagee is the "true owner," to the extent of his interest (*Ex parte Union Bank of Manchester*⁴). It seems to me that the instrument in question in the

1. 1 Ves. 348: S. C. 1 W. & T. L. C., in Eq., 96.

3. L. R. 2 Q. B. 474.

2. 10 Ex. 545.

4. L. R. 12 Eq., 354.

present case does nothing more than create a charge on future debts in favour of the appellant, that it does not amount to an equitable assignment of the debts, and that the equitable interest of the appellant in the debt is not such as to constitute him the true owner within the meaning of the section. The instrument does not operate as an assignment either in law or in equity. I am not prepared to say, in the absence of express authority, that the doctrine of reputed ownership can apply in the case of a "charge" on future debts such as that created by the instrument in question in the present case. In my opinion C. Bhashyam Aiyangar was himself the "true owner" of the debt subject to the equities created by the charge in favour of the appellant, and if this be the true view, the doctrine of reputed ownership can have no application. Assuming I am wrong in this view, the effect of the notice given by the appellant to Mr. Nelson has to be considered. It has been established by a long series of decisions that notice to the person who owes the debts will take the case out of the section. [See *Belcher v. Bellamy*,¹ *Alletson v. Chichester*,² *Ex parte Union Bank of Manchester*,³ *In re Seaman*,⁴ *Tailby v. The Official Receiver*.⁵ The notice of course must be an effective notice—that is to say, it must be such a notice as would prevent the party who owes the debt from paying any one but the party giving notice.

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In the present case it is in evidence that before the adjudication, a notice was sent on behalf of the appellant to Mr. Nelson that the debt was claimed by the appellant. Assuming the appellant was the true owner of the debt and C. Bhashyam Aiyangar the apparent owner, the legal effect of this letter was, in my view, to take the debt out of the order and disposition of the apparent owner before the insolvency.

But although I do not agree with the view taken by the learned Judge with reference to the question of reputed ownership, I think he was right in dismissing the application. By virtue of section 7 of the Act, upon the adjudication and the vesting order made thereunder, the right, title and interest of the insolvent in and to the debt due from Mr. Nelson to him became vested in the Official Assignee. Assuming that the effect of the instrument of March 13, 1897, was merely to create a charge and that the

1. 17 L. J. Ex. 219.

2. L. R. 10 C. P. 319.

3. L. R. 12 Eq., 354.

4. [1896] 1 Q. B. 412.

5. L. R. 13 A. C. 523.

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instrument did not operate as an assignment, either legal or equitable (and this, I think, is the true view), the right which vested in the Official Assignee was a right to sue for the debt.

After Bhashyam Aiyangar's interest in the debt became vested in the Official Assignee, the appellant, by virtue of the decree in his mortgage suit, acquired the right to have the debt sold. Before the debt was sold, the Official Assignee's chose in action was reduced into possession by the fact of the payment to him by Mr. Nelson. In this state of things it seems to me that the appellant's procedure by way of attachment was clearly misconceived and that the order for attachment of the debt in the hands of the Official Assignee was ineffective. The appellant has the rights of a secured creditor in the insolvency of C. Bhashyam Aiyangar and he is entitled to enforce these rights if he adopts the proper procedure. I express no opinion as to whether he would have been entitled to enforce his rights by execution proceedings in the suit in which he obtained his mortgage decree if, after the adjudication, he had made the Official Assignee a party to the suit. During the pendency of the appellant's suit and before he obtained his decree, C. Bhashyam Aiyangar's interest in the debt due to him from Mr. Nelson, subject to the appellant's equitable rights therein, devolved by operation of law upon the Official Assignee. The appellant might have applied under sections 32 and 372 of the Code of Civil Procedure to have had the Official Assignee added as a party. He did not do so. It seems to me that section 372 applies to the devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder, and if *Miller v. Budh Singh*¹ is to be regarded as a decision the other way, I think that decision is wrong. In *Miller v. Lukhimani Debi*² the attachment was before the vesting order. In the present case the order for attachment was after the vesting order. It has been argued on behalf of the appellant that the Official Assignee is bound by the decree, though not a party to the suit, inasmuch as the devolution of interest took place *pendente lite*. This, in my opinion, is clearly not so. In the first place, the subject-matter of the suit was not real property. In the second place the interest devolved by operation of law, and so far as the Official Assignee is concerned the devolution was *in invitum*. For the reasons I have stated I do not think the appellant is en-

1. I. L. R. 18 C. 43.

2. I. L. R. 28 C. 419:

titled to an order for the payment over of this money by virtue of his so-called "attachment," and if he is not entitled by virtue of his "attachment" there is, so far as I can see, no provision of law or principle of equity which entitles him to the order for which he asked on an application made in a suit to which the person who was called upon to pay over the money was not a party.

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I think the application was rightly dismissed by the learned Judge and that this appeal ought to be dismissed with costs.

Bhashyam Iyengar, J. :—I am also of the same opinion.

Whether Section 23 of the Insolvency Act applies to the case or not, depends upon two questions :—

- (i). Who was the 'true owner' of the chose in action—*viz.*, the debt of Rs. 4,000, due to the judgment-debtor, which debt among other things is comprised in Exhibit A which purports to be a mortgage security executed by him to the plaintiff (appellant).
- (ii). Whether in case the plaintiff was the 'true owner,' the said chose in action was with his consent and permission 'in the possession, order or disposition' of the defendant (the judgment-debtor) at the time the petition of insolvency was filed by him.

In the decree which was passed in favour of the plaintiff the said mortgage security was treated as a regular mortgage deed by providing for redemption by the defendant and re-conveyance to him by the plaintiff, if the amount decreed were paid on or before the day fixed in the decree, and ordering a sale of the goods and chattels comprised in the schedule. The chose in action now in question is assumed to be comprised in the said schedule though it is not specifically included in it.

If Exhibit A can be construed as an assignment, or transfer by way of mortgage, of the debt in question, along with other chattels to the plaintiff, as security for the mortgage debt, (Section 134 of the Transfer of Property Act) or as an agreement to make such assignment, the plaintiff would undoubtedly be the 'true owner,' and the defendant, the 'reputed owner' of the chattels therein comprised, within the meaning of S. 23 of the Insolvency Act, and the solution of the 2nd question is also rendered easy by the fact

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that before the defendant was adjudicated an insolvent, notice of the plaintiff's claim appears to have been duly given by the plaintiff on the 2nd and 5th August 1899 to Mr. Nelson who owed to the defendant the debt in question. If Exhibit A were construed as a mortgage the plaintiff would be the 'legal' owner, and if it could be construed as entitling him to obtain a mortgage, he would be the 'equitable' owner. In regard, however, to the debt in question, which did not exist at the time when the security was given, but was a future debt which came into existence and became owing, before the adjudication of insolvency, the plaintiff, under either construction of the instrument, can be regarded only as an 'equitable mortgagee'. The expression 'true owner' has been definitively settled to apply as much to an equitable owner as to a legal owner. (*Ex parte Union Bank of Manchester*¹; *Bhavan Mulji v. Kavasji Jehangir*.²)

If the plaintiff be the true owner, there would be no difficulty in regarding the mortgagor in possession, i. e., the defendant, as reputed owner.

Though Exhibit A purports to give the plaintiff a mortgage of all the stock-in-trade, existing and future debts, &c., yet there are in it no words transferring to the plaintiff the ownership or any interest in the chattels. The ownership and the right to possession are fully reserved by the defendant, and the plaintiff is only given the right to inspect the defendant's books of account and other stock-in-trade and effects, during the time the security is in force. Even in default of payment the creditor is not given any right to take possession of the goods and chattels.

It seems to me that the instrument can be construed only as creating in favour of the plaintiff, a charge or hypothecation without passing to him "either an absolute or a special property in the subject of the security or any right of possession, but only a right of realisation by judicial process in case of non-payment of the debt" (Judgment of Lord Holt in *Johnson v. Shippen*,³ *Stainbank v. Fenning*⁴; *Stainbank v. Shephard*.⁵)

In *Burlinson v. Hall*⁶ Day, J., in distinguishing, for the purposes of S. 25, sub-section 6, of the Judicature Act (1873), an absolute

1. L. R. 12 Eq 254.

3. 2 Ld. Raym, 982.

5. 17 Jur 1032.

2. 1 L. R. 2 B., 542 (546.)

4. 11 C. B 51: S C.

6. 12 Q B D. 347.

15 Jur. 1082.

'assignment' by way of mortgage of a debt, from a transaction 'purporting to be by way of charge only' on the debt, defined a mere 'charge' as follows (at p. 350):—

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"It is said that the assignment 'purports to be by way of charge only.' It is said that it is a mere 'charge.' I do not agree. A 'charge' differs altogether from a 'mortgage.' By a charge, the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt. But a charge differs from an 'assignment.' A charge on a debt confers rights on the person to whom the charge is given, to have it enforced by assignment—not by action against the debtor, but by proceeding against the person who created the charge, to assign the debt." This was fully concurred in by *A. L. Smith, J.* (*per Lord Hatherly, L. C.* in *Tennant v. Trenchard*¹.)

It will be seen that even a mere charge or hypothecation is treated as an 'equitable assignment' under the English Law.² It may be that under the Indian procedure the proceedings against the person who created the charge should be not to enforce assignment of the debt, but for sale of the debt as a chattel. But that really comes to an involuntary assignment by the person who created the charge. In a case arising under the Indian Insolvency Act (11 and 12 Vict. Cap. 21) I prefer to be guided by English cases rather than by deductions to be drawn from the Indian Code of Civil Procedure.

During the argument of this appeal, I was under the impression that in the case of a mere charge, the charge-holder is not the true owner, but that the person who created the charge continues to be the true owner, that he cannot therefore be regarded as the reputed owner and that the section therefore would be inapplicable. But on further reflection I have come to the conclusion that in section 23 the expression 'true owner' standing in antithesis to 'reputed owner' in the same section, is not used in any technical sense, but in its true and popular sense as indicating the person who for all practical purposes is the real and substantial owner of the goods and chattels, *i. e.*, the person having the real and substantial interest in them, whether in the eye of law or of equity, the person creating the charge who technically continues to be full owner or

1. L. R. 4. Ch. App. 537 at pp. 543 and 544.

2. Fisher on 'Mortgages' 5th Edn. para. 225.

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the mortgagor, as the case may be, being entitled merely to the difference if any between the full price of the goods and chattels, and the amount charged thereon in favour of the creditor. A charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as the mortgagee thereof and if either of them allows the mortgagor or the person creating the charge, to remain in possession of the goods and chattels, under circumstances which will lead to his being 'reputed' as owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee.

This being the principle underlying section 23 of the Insolvency Act, it can make no difference whether the person allowing the goods and chattels to remain in the 'possession, order or disposition' of the person adjudged an insolvent, is a mere charge-holder, or a mortgagee or absolute and full owner. In *Ex parte Union Bank of Manchester*¹ already referred to, Sir James Bacon, C. J., explains the policy of the 'order and disposition' clause in the Insolvency law as follows:—(p. 357) "The 'order and disposition' clause has been frequently objected to and reprobated, yet from the commencement of Bankruptcy law it has been maintained as a principle that property suffered to remain in the visible possession of a bankrupt is divisible among his creditors, and so the law is now. I had at first doubts whether the equitable mortgagee in this case was the true owner; but my doubts have been removed by the series of decisions quoted by Mr. De Gex in which the mortgagee has been held to be the true owner." Kennedy, J., as Commissioner in Insolvency in *In re Murray*² dealing with the order and disposition clause in connection with goods pledged by the insolvent and re-delivered to him on commission sale, made the following significant observation as to the principle of that clause, (at p. 63) "I believe it to be impossible and against the spirit of the Act, by any conveyancing device to give a lien for money advanced upon goods previously the property of the bankrupt and returned to or permitted to remain with him. The power of so borrowing money would be much more dangerous than that of raising money by sales at an undervalue equivalent to the amount which would be advanced on pledge."

1. L. R. 12 Eq. 354 (357).

2. I. L. R. 3 C. 58 (63).

“Where a mortgagor is by the mortgage deed entitled to remain in possession till demand, it has been held he is in possession with the consent of the true owner—the mortgagee. (*Freshney v. Carrick*,¹). It was formerly held in some cases that when the mortgagee has covenanted to allow the mortgagor to remain in possession, the ‘order and disposition’ clause did not apply; but these cases cannot now be relied on (*Ashton v. Blackshaw*,² *Ex parte Homan*,³ *Ex parte Harding*⁴). Where there is a mortgage of chattels with a proviso for quiet enjoyment by the mortgagor till default, or where the mortgagor takes under the mortgage deed an interest in the chattels determinable upon his default in payment, and on notice from the mortgagee, the mortgagor, no doubt, is in a sense the true owner, as the mortgagee cannot until the term or interest of the mortgagor is determined, bring trover (*Fenn v. Bittlestone*⁵ and if the mortgagee seizes the chattels without due notice of payment, the mortgagor can bring trespass against him (*Brierley v. Kendall*)⁶. But within the ‘reputed ownership’ clause in the Bankruptcy law, it has been held that in these cases the mortgagor is not the true owner, ‘on the ground that such interest of the bankrupt was really illusory, and substantially, if not technically, permissive, that the law will not allow a mortgagor of chattels to stay in possession and so evade the rule and that where the mortgagee can enter into possession by giving a short notice or (as it was put by Mr. Justice Willes) where the mortgagee consents to put himself in a position in which he has no immediate right to the possession of the goods, they are in reality in the possession of the mortgagor with the consent of the true owner (*Spackman v. Miller*)⁷). So far as the general creditors are concerned, the mortgagor in such a case, has the reputation of absolute ownership, though as between himself and the mortgagee, he has a real though limited interest⁸”

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I have not been able to find any English case in which the question of ‘reputed ownership’ presented itself for consideration, in connection with a mere charge or hypothecation of a chose in action or other chattels, as distinguished from an assignment thereof by way of mortgage. But having regard to the authorities

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| 1. 1 H. & N. 653. | 3. L. R. 12 Eq. 598. | 5. 7 Ex. 152. |
| 2. L. R. 9 Eq., 510. | 4. L. R. 15 Eq. 223. | 6. 17 Q. B. 937. |
| 7. 12 O. B. N. S. 659. | 8. Robbins on ‘Mortgages’ p. 185. | |

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above quoted and the policy of the 'order and disposition' clause, it seems to me that no distinction can be made between the two classes of cases. A mere charge or hypothecation being regarded under the English equity jurisprudence as an 'equitable assignment', it must be held that the decision of *Sir James Bacon, G. J.*, in *Ex parte Union Bank of Manchester*¹ above quoted, is applicable as much to a mere charge or hypothecation of a chose in action, as to an equitable mortgage by deposit, with a banker, of a certificate of shares in a joint-stock gas company.

In the matter of *Ambrose Summers*,² Mr. Justice Sale, as Commissioner in Insolvency, gave effect, as against the Official Assignee, to a letter of lien over the stock-in-trade, &c., given by an insolvent to his creditor by way of collateral security for a promissory note and for future advances. The insolvent also undertook by his letter to execute, whenever called upon by his creditor to do so, an assignment of all his business with such conditions as the creditor may require. The letter was written on the 31st December 1890, and in July 1895 the creditor called upon the insolvent to execute an assignment by way of mortgage of the whole of his business, stock-in-trade &c. But the insolvent, though he approved of the draft mortgage-deed, subsequently refused to execute it. On 21st August 1895, the attorneys of the creditor served a notice on the insolvent, demanding possession on behalf of the creditor which was refused. They then attempted to take physical possession, but failed, and on the next day, 22nd August 1895, the insolvent filed his petition and the Official Assignee took possession of the sale proceeds of the insolvent's stock-in-trade, &c. Upon these facts, Justice Sale held that the letter "must be regarded in the first place as a letter of hypothecation, whereby the insolvent pledged to the bank the then existing assets of his business as collateral security for the debt then due to the bank and for any future advances the bank might make to the insolvent. Accordingly on the authority of *Ex parte North Western Bank*³ the letter created an equitable charge on such assets in favor of the bank." He therefore held that the bank was entitled to preferential payment of "so much of the funds in the hands of the Official Assignee as can be shown to represent assets of the insolvent's business, which were in existence at the date of the letter of hypothecation." The ground of decision, which is not expressly stated, does not seem

1. L. R. 12 Eq. 354. 2. I. L. R. 23 C. 592. 3. L. R. 15 Eq. 69.

to be that the case so far as it related to the charge on the assets which were in existence at the date of the hypothecation, was outside the 'reputed ownership' clause. I gather from the observation (at page 600) as to the attempts made by the bank to take possession, that the ground of decision was that the bank "did enough to show that the business or stock-in-trade of the insolvent was not in the order or disposition of the insolvent at the date of his insolvency, with the permission and consent of the bank". As regards the agreement contained in the letter, to execute an assignment of future business, Justice *Sale* held that it was invalid, as against the Official Assignee, as an act of bankruptcy within the meaning of Section 9 of the Insolvency Act.

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In my opinion, therefore, the plaintiff was the true owner of the debt due to the defendant from Mr. Nelson. The point now to be considered is whether, before the defendant was adjudged an insolvent, it was taken out of his order and disposition by the plaintiff, the true owner. This question is concluded in favor of the plaintiff by the decision of the House of Lords in *Tailby v. Official Receiver*¹. In that case, by a mortgage dated 13th May 1879, Izor assigned for valuable consideration, to the predecessors in title of the appellant, his stock-in-trade and all the book debts owing or which might, during the continuance of the security, become due or owing to the said mortgagor. In the months of October and November 1884, Izor supplied a firm of Wilson Brothers and Co., upon credit, with goods to the value of £10-7-11. The appellant gave notice of the assignment to that firm and received payment of the amount to himself. Some time after the date of the notice, Izor was adjudged bankrupt and the respondent who was trustee of the estate, sued the appellant for repayment of the amount received by him from Wilson Brothers and Co.. The amount due by them to the insolvent, being a chose in action did not come within the scope of the Bills of Sale Act and though it was not in existence at the date of the assignment, was capable of being the subject of present assignment in equity. *Lord Watson* (at p. 534) held that "in the case of book debts as in the cases of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain so long as the debt is unpaid and is *sufficient to take it out of the order and disposition*

1. L. R. 13 A. C. 523.

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of the assignor. In this case the appellant's right if otherwise valid was, in any question with the respondent duly perfected by the notice to Wilson Brothers & Co. before Izor became a bankrupt."

Such notice, appearing to have been given in this case to Mr. Nelson before the defendant was adjudged an insolvent, the debt was not in the possession, order or disposition of the insolvent at the time of the vesting order.

Even in the view that there was a mere charge upon the debt as distinguished from an assignment of the same by way of mortgage, it is taken out of his order and disposition, if not by the alleged notice to Mr. Nelson, at any rate by the suit which was brought against the defendant to enforce the charge prior to his being adjudicated as insolvent (*per Day, J.*, in *Burlinson v. Hall* already referred to).

If the plaintiff otherwise had a valid charge on the debt in question, it is not extinguished by S. 23 of the Act and under S. 7 it would have vested in the Official Assignee, subject to the plaintiff's charge.

The question which has now to be considered is whether the decree which the plaintiff obtained against the defendant, subsequent to his adjudication as an insolvent, enforcing the charge by directing a sale, is binding upon the Official Assignee and if so whether he can be ordered in proceedings in execution of that decree to pay to the plaintiff the amount of Rs. 4,000, which was paid by Mr. Nelson into the hands of the Official Assignee, notwithstanding the notice which, it is alleged, was given to him by the plaintiff, prior to the adjudication of the defendant as an insolvent.

The decree, in so far as it is a mere money decree, is perfectly valid against the insolvent and I agree with the decision of the Calcutta High Court (in *Miller v. Budh Singh*,² followed in *Chandmull v. Ranee Soondery Dossee*,³) that in an action purely '*in personam*' against the insolvent, whether he was adjudged an insolvent prior to the institution or during the pendency of the suit, the Official Assignee need not be made a defendant either in addition to or in lieu of the insolvent, that in fact it is wrong to do so and that section 372, C. P., C. is applicable only to the case of an assignment of an interest in the subject-matter of the suit during the pendency of the suit. If the attach-

1. 12 Q. B. D. 347. 2. I. L. R. 18 C. 43. 3. I. L. R. 22 C. 259.

ment, which was made, of the debt due from Mr. Nelson, is to be regarded as an attachment made in execution of the first part of the decree as a mere money decree, it has necessarily to be released from attachment (under section 280, C. P. C.) by reason that the vesting order was prior to such attachment. Further, if, as the plaintiff says, he has a charge upon the debt, section 99 of the Transfer of Property Act, or at any rate the principle therein involved, is a bar to his bringing the debt to sale in execution of his decree as a mere money decree and he can bring it to sale only in enforcement of his charge thereon.

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The decree, as a mortgage decree directing the sale of the chattels, including the debt in question, is void and inoperative as against the Official Assignee, inasmuch as the whole right, title and interest of the defendant therein devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree was passed. Unless therefore the doctrine of '*lis pendens*' is applicable when chattels personal form the subject-matter of the suit and to cases of assignment by operation of law, the decree against the insolvent, enforcing the mortgage or charge by an order for sale, can be no more binding upon the Official Assignee or be capable of being executed against him, than it would have been if the defendant had been adjudged an insolvent prior to the suit and the suit had been brought against him and him alone subsequent thereto and the decree obtained. If the doctrine of '*lis pendens*' were applicable to the case, the decree can of course be executed against the Official Assignee in the same manner as against the judgment-debtor himself (section 333 of the Civil Procedure Code); and the fact that the Official Assignee received payment of the debt from Mr. Nelson, will make no difference and he can be directed in execution of the mortgage portion of the decree to pay over the amount to the decree-holder (section 277, Civil Procedure Code) just as the judgment-debtor himself can be so ordered, if he had received such payment from Mr. Nelson.

The decision of the Court of Appeal in *Wigram v. Buckley*¹ is a direct authority that the doctrine of '*lis pendens*' does not apply to personal property 'other than chattel interests in land'. The decision of the Master of Rolls in *Wood v. Surr*² is an equally

1. [1894] 3 Ch. 483.

2. 19 Beav. 551.

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direct authority on the other question that where a mortgagor becomes bankrupt pending the suit, the trustee in bankruptcy is not bound by a decree for foreclosure in his absence¹.

The principle of the decision in *Wood v. Surr*² is that the Official Assignee being one appointed '*in invitum*' and not a 'voluntary purchaser' as in the case of a transfer by act of parties or by an 'involuntary sale' in execution of a decree, the doctrine of *lis pendens* cannot affect him and the party seeking to bind him (the Official Assignee) by the result of the suit, pending which the interest of its subject-matter has devolved on him by operation of law, ought to take proceedings to join him as a party to the suit (under Section 372 of the Civil Procedure Code) and obtain the decree against him.

A charge or mortgage created by the insolvent, prior to his adjudication as an insolvent, may, under the bankruptcy law, be void against the Official Assignee though under the general law, it may be binding on the insolvent himself. A decree, therefore, purporting to enforce such charge or mortgage will bind the Official Assignee, only if it was passed in a proceeding between the secured creditor and the Official Assignee, in which the validity of that charge or mortgage, as against the Official Assignee, was adjudged.

The learned Judge was therefore right in dismissing the plaintiff's application and I agree that this appeal should be dismissed with costs.

1. Robbins on 'Mortgages,' p. 1012; Fisher on 'Mortgages,' 5th Edn., concluding portion of para 1651.

2. 19 Beav. 551.

IN THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL.

(FROM THE MADRAS HIGH COURT.)

Present :—Lord Macnaghten, Lord Lindley, Sir Ford North,
Sir Andrew Scoble and Sir Arthur Wilson.

Raja Chelikani Venkayamma . . . Appellant.

v.

Raja Chelikani Venkataramanayamma... Respondent.

Hindu Law—Revocation of will—Maternal grand-father's property—Estate taken by daughter's sons, nature of—Rights of Survivorship—Obstructed inheritance—Joint dealing—Printing of Records in Privy Council Appeals.

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Actual destruction or a formal revocation in writing of a will made by a Hindu in the mofussil is not essential to constitute revocation. *Pertab Narain Singh v. Subba Koer*, L. R. 4 I. A. 228 referred to.

The estate taken by a daughter's sons is in the nature of ancestral property though in the hands of the grandfather it was separately acquired.

The doctrine is not universally true that persons succeeding to obstructed inheritance take as tenants in common and not as joint tenants with rights of survivorship.

Members of a joint family succeeding to self-acquired property take it jointly.

Where, therefore, two sons of a daughter living together as members of a joint family succeeded to the estate of their maternal grandfather and one of them died without leaving any issue but his widow daughters and surviving brother.

Held, that the surviving brother took by survivorship the share of the deceased brother to the exclusion of the latter's widow.

Jasoda Koer v. Sheo Pershad Singh, I. L. R., 17 C. 38 } overruled.
Saminatha Pullai v. Thungathanni, I. L. R., 19 M. 72 }

Obiter.—Property inherited from the maternal grand-father by his daughter's two sons may be treated as joint by course of conduct.

The course adopted in this case of printing documents wholly unnecessary and swelling up the record strongly disapproved.

Venkataramanayamma v. Appa Rao, I. L. R., 20 M. 207 reversed.

Counsel for appellant :—*John D. Mayne* (instructed by *R. T. Tasker*).

Counsel for the respondent :—*James Jardine*, K. C. and

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Mayne :—My Lords, this case looks very formidable; but I do not think it is as formidable as it looks.

Lord Macnaghten :—I see the appendix contains a vast number of documents which have nothing to do with it.

Mayne :—All these accounts—yes. If there had been a sample of them, if there had been one year of the accounts, and then a “ditto” added, it would have been quite sufficient. The rest are all the same.

Lord Macnaghten :—It is a monstrous thing. It comes over and over again.

Mayne :—I believe there are five more volumes which my learned friend has got. I believe we shall hear nothing of them, at least. I see nothing of them, and I do not intend to see anything of them. My record speaks of five volumes missing from these.

Lord Macnaghten :—It is very wrong. We have done all we can, over and over again, to curtail these records.

Mayne :—If I should fail in this case which I hope I shall not, I should ask your Lordships to make some summary observations on the record with a view of relieving me from a good deal of the costs.

Lord Macnaghten :—These are your documents, the appellant’s papers?

Mayne :—Yes. I do not know that many of them are superfluous. My learned friend has got five. I do not think he has brought them into Court.

Now, my Lords, if your Lordships will look at page 2 of the appellant’s case, I think I shall be able in a very few words to put your Lordships in possession of what the questions are. Venkat Rao, who appears at the head of the pedigree, was the owner of all the property which is now in dispute. He died on the 22nd of July 1869, having made a will on the 7th September 1866. He was succeeded by his widow Venkayamma, who died on the 14th of July 1875. He and Venkayamma had a daughter Venkata-

ramanayamma, who in his life-time married a man named Chelikani Sami Royanin, who introduces the name Chelikani into this transaction. He had two sons, Chelikani Niladri and Chelikani Appa Rao; but Chelikani Niladri was the only son who was alive at the time Venkat Rao made his will, and in fact in his life-time, which is material to some of the points. They had also two daughters, which we need not trouble ourselves with in passing. Now Venkata-ramanayamma, the daughter, succeeded Venkayamma in the heirship to the property, Venkat Rao never having had any male issue. She held the property until the 6th July 1884, when she died. At that time Appa Rao was a minor. Chelikani Niladri, on his own behalf, and on behalf of Chelikani Appa Rao succeeded to the property; and when Chelikani Appa Rao attained his majority the two of them held it together in the manner—I say cautiously ‘in the manner’—in which the sons of a daughter would hold property, because what that manner is is one of the questions in dispute. Now Chelikani Niladri died on the 3rd of September 1892, leaving Appa Rao and his father, still living. He left a will as to which very few words will have to be said. He also left a widow, who, again, has this portentous name Venkataramanayamma. She is the plaintiff in this suit. I may say that there are two suits pending, or rather there were two suits. She brought a suit claiming, amongst other things, under a will of her husband Niladri. That was Original Suit No. 8 of 1893. Appa Rao brought a cross suit, which was No. 12 of 1893, to set aside that will, and declare that it was invalid. However, I need say nothing more about Appa Rao’s suit, because both suits were heard together upon the same evidence, and in the first suit it was decided Niladri’s will was bad, which, of course, gave him everything that was required in the other suit.

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Now I will shew your Lordships what the contentions are. After the death of Niladri, Venkataramanayamma brought her suit, in which she made two contentions. First, she claimed the whole of the property left by Venkat Rao; secondly, and in the alternative, she claimed half of the property. Her claim for the whole of the property was founded in this way. She said that Venkat Rao in his will of the 7th September had made limitations, the effect of which was that when the property reached Niladri it

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reached him under the will, and not by inheritance, and that under the will it became his absolute property; and she said that Niladri had made a will in her favour which conferred the whole of his interest upon her. That was the mode in which she raised her claim for the whole of the property. Then her claim for the half of the property was founded upon the assertion, putting the wills out of consideration, that when the property reached two daughter's sons they took it, not as joint tenants, but as tenants in common, and, therefore, that Niladri's share of the property descended to her as his widow. Now these contentions were met by Appa Rao in this way. As regards the contention for the whole of the property he said, first of all, that this will had been revoked by Venkat Rao during his lifetime. Secondly, he said if it were not revoked it made no difference whatever, because under the will he gave no separate interests to Niladri, or to any one else, but simply pointed out the ordinary course in which the property would descend to persons entitled to it after his death. Then as regards Niladri's will, that was met by the simple mode of saying that that will was a forgery. Now as regards the alternative claim for half of the property, that was met in this way. In the first place it was denied, as a matter of law, that property falling upon daughter's sons in the way it did here, would be held by them as tenants in common, and not as joint tenants. If held as joint tenants, then it would pass by survivorship to the younger brother on the death of the elder. Then there was an alternative defence: that even supposing they were tenants in common still they had in their lifetime elected to do, as they lawfully might do, and thrown all the property together, and treated it as joint property; so that if it were not originally joint property it became joint property, and passed by survivorship on the death of Niladri to the remaining brother Appa Rao. Those were the contentions.

The decisions of the Courts were in this way. The Original Court held that Venkat Rao had, in fact, revoked his will during his lifetime. On appeal that finding was affirmed and I submit that that is a finding of fact which this Court is not likely to upset. In addition to that the Original Court held that, even if the will were still in existence, that will was not intended to, and did not, in fact, do anything except point out the testator's view as to the line of descent which his property was to take: that is, that it was to go first to his

widow, then to his daughter, and then to his daughter's son ; and that the only reason he did not mention Appa Rao was because Appa Rao was not then in existence, but that it might be supposed that if he had been in existence, he would not have mentioned him. That is the way the first will was got rid of. Then the second will was got rid of by both the Courts by the simple process of finding that it was a forgery ; and there seems to be no attempt to contend with that finding in this case ; and, therefore, it must be assumed that that finding is a valid one.

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I think, therefore, that upon mere questions of fact the lady's claim to the whole of the property is disposed of, and finally disposed of before it reaches your Lordships.

Now then as to the alternative claim. The first Court did not consider the question whether the brothers held as tenants in common or as joint tenants ; but it did decide, as a matter of fact, that if they held as joint tenants, then they had elected to throw and had, in fact, thrown all the property together, and treated it as joint property during their lifetime, and, therefore, that it devolved in that way by survivorship upon Appa Rao. Accordingly the Original Court gave judgment in favour of the defendant, Appa Rao, who is my client. Then, on appeal, the High Court, as I have said, dealt with the whole property by rejecting both wills, but it pronounced no decision as to what the legal operation of Venkat Rao's will would have been if it had continued in existence. It decided both contentions of the lady as regards the half of the property against us ; it decided as a matter of law that the brothers were tenants in common ; and upon the matter of fact it reversed the finding of the Original Court. It appears not to have doubted that the mode in which the brothers had dealt with the property looked very like dealing with it as joint tenants, and would, in the case of ordinary people, have been supposed to be a dealing with it as joint tenants ; but having decided that they were in point of fact tenants in common, it held that they could not have been supposed to have intended to alter that mode of holding ; and that in fact they had held it in the way that they did hold it, merely as a matter of convenience : not with a view of altering their status. Practically, my Lords, as far as I am concerned, in this appeal the only questions that I have to deal with are : the question of law as to the nature

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of the tenancy, the question of fact as to what the legal result of the mode in which the two brothers dealt with their property had been.

Lord Lindley :—You go for a joint tenancy.

Mayne :—I go for a joint tenancy.

Lord Lindley :—No severance, no partition?

Mayne :—No severance, no partition, nothing. I say there was originally a joint tenancy; but in the alternative if there had not been an original joint tenancy, there was a manufactured joint tenancy, which will do for me just as well. I am in the happy position, your Lordship sees, of having two strings to my bow, either of which is sufficient for me. If I make out the original joint tenancy, I do not want the mode of dealing. If, on the other hand, I fail in the original joint tenancy, then I rely upon the judgment of the Original Court being right, and the judgment of the Appellate Court being wrong.

Lord Macnaghten :—It would require a very peculiar course of dealing to turn a tenancy in common into a joint tenancy—if it is nothing more than a mere dealing.

Mayne :—I submit that whatever is necessary in this case we have got. Of course, I do not wish to anticipate what my argument on that point will be until I come to it.

* * * * *

Then the issues are at page 54. The first issue is as to the revocation of the will. The second issue is as to the operation of the will supposing it to be still in existence. The third issue is :—“Whether under the will of 1866, or under Hindu Law, the plaintiff’s husband Surya Niladri Rao, took the whole estate or less.” The 4th issue is :—“Whether, if plaintiff’s husband did not take the whole estate, he and 1st defendant Appa Rao became entitled thereto as joint tenants with benefit of survivorship, or as tenants in common.” Then there is a plea as to the Statute of Limitations which I do not think I shall rely upon. Then there is another plea :—“Whether plaintiff is estopped by reason of her late husband’s conduct from claiming an exclusive right to the suit estate?” The 7th is “Whether plaintiff’s husband, and 1st defendant Appa Rao, treated Venkat Rao’s property as joint property.” The 8th Issue is as to the

will of Niladri Rao; and the 9th issue is as to the construction. The 10th issue is:—"Whether 1st defendant Appa Rao acquiesced in the disposition of the property under the said will, and is estopped by his conduct from questioning its genuineness and validity." The 11th issue is:—"Whether under any circumstances Plaintiff is entitled to more than a moiety of the suit property." Then these others are all as to the result of the previous findings.

I shall now proceed to read the two judgments to your Lordships.

[Adjourned for a short time.]

Mayne :—Then my Lords, I think I may skip the next three paragraphs, and go on to the 17th :—The 8th issue raises two questions: "Whether the will of 1892 is genuine and whether it is valid." Then, having introduced that issue to your Lordships I shall skip everything that the Judge says upon it, because he finds that the will was a forgery. I will read paragraph 29, at page 2641 :—"For these reasons I find that this will of September 2nd, 1892 was not executed by Chelikani Niladri Row." I think that is all I need read of that judgment.

Lord Lindley :—That is in your favour so far as the joint tenancy is concerned?

Mayne :—Yes. Now there is an appeal against that at page 2651 and there are objections at page 2653, and, then there is the High Court's Judgment at page 2670. I will begin at page 2671, the last paragraph, at the bottom :—"The first question, therefore, for determination is whether Exhibit A was revoked" &c., &c. [Reads down to the words, at line 20, page 2672] "as required by law, must be excluded from consideration." I cannot quite make out why they excluded it from consideration.

Lord Macnaghten :—It was not evidence.

Mayne :—No.

Lord Lindley :—You do not rely on the will at all?

Mayne :—No.*

* * * * *

I do not intend to rely on any thing that this Lakshmidhara* said, and for this reason, that the whole of this is gone into. It is a curious thing the High Court does not refer to it. The whole of it is cited in the Sivaganga Case, where the question arose whether the eldest of daughters' sons still existing, or the son of

* Cited in Saraswati Vilasa. Foulkes' Translation.

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the eldest daughter would take; and this passage was relied on as showing that the younger son by an elder daughter would take because the property vested in her, and therefore, passed on to him, but the whole of that was discussed, and overruled both in the Original Court and in the High Court, and before your Lordships when the case came on for hearing in the 8th Indian Appeals, page 99. It is an absolute fallacy. It is only one of those ideas cast out by Hindu commentators out of their own consciousness which do not bear further examination. I do not rely on that at all. In the 8th Indian Appeals it was held that the sons take direct from the grandfather, and that they take upon their own merits; and that of course in regard to impartible property as the Shivaganga estate was, the eldest son must take irrespective of the antiquity of his mother. "*Muttayan Chetty v. Sivagiri Zemindar*" &c., &c. [Reads from line 22, page 2678 down to the words at line 8, page 2681] "consequently Niladri's moiety passed to the Appellant as his widow and heir." Then there is his minor point. That relates to the second Respondent and we need not trouble ourselves with it. Then they go on at line 25 as to the alleged will of Niladri.

Lord Lindley :—This is the forged will ?

Mr. Mayne :—The forged will. At page 2683, line 18 they say this, after examining all the evidence : "We therefore agree with the District Judge in holding that the document is not genuine." Then they, rather unnecessarily, go on to consider why the forgery took place, which is a thing I do not think it is necessary to trouble your Lordships with. Then at page 2684, line 30 they sum up :—"To sum up then" &c., &c. [Reads down to the words] "that Exhibit C. K. is not genuine."

Now my Lords, the points that I have to contend against are, first, their finding that under the circumstances of this case the two brothers took as tenants in common and not as joint tenants; and secondly the finding that if they took as tenants in common they had not by mutual arrangement held, and agreed to hold, the property as joint property and not as, in fact, separate property.

* * * * *

As to the question with reference to the property devolving upon daughter's sons, in this particular case your Lordships will

see it devolves upon the sons of a single daughter by a single husband, uterine brothers who are living as members of a joint family with their father, and with each other. This is the case, therefore, of the descent of the property from the maternal grand-father upon two persons who, as a matter of fact, are members of a joint family, and are joint and undivided with each other. The property devolves upon them by a single title. It devolves upon them at the same instant; and the question is whether they hold it as joint property or as tenants in common. This question has never come before this Court. It is a point upon which you derive no assistance from any thing to be found in the Native writings, except so far as any inference can be drawn, as they have drawn in this case, from other doctrines of the native writers upon which there is no doubt. As far as I know, there is no word in the native language which draws a distinction between tenancy in common and joint tenancy. Joint tenancy is, of course, a thing perfectly familiar to the writers; and I think you would find it very difficult to explain to a native pundit what was meant by, a tenancy in common, although there are various forms of holding property which, in consequence of the particular doctrines which apply to them, do give them, in fact, some of the incidents attaching to tenancy in common in preference to joint tenancy. Your Lordships will find that, putting aside the argument derived from this *Lakshmidhara*, which I do not rely upon, and putting aside the argument derived from those two decisions of *Muttayan Chetti* and *Shivaganga Zemindar*, which again I do not rely upon, because I think as far as they touch this case they are bad law—putting them aside, this decision relies upon two distinct lines of argument. First it relies upon the fact, that where a person has such an interest in his father's, or his grand-father's property as entitles him to restrain that father or grand-father in the disposal of the property, that property must be property which would come to him in the nature of an unobstructed heritage, that is, it must be property in which he already possesses an interest by virtue of his birth, which interest cannot be divested from him, or intercepted by the birth of any one else. Nobody disputes that. I do not in the slightest degree dispute that no one can possess such an interest in property actually in the possession for the time of his father, or his grand-father, as would allow him to dispute the right of that father or grand-father to dispose of the property to

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his detriment in any way he liked, unless it was in the nature of unobstructed property. I do not assert that in the present case this was unobstructed property. I do not assert that the sons in this case could have exercised the slightest control over their maternal grandfather so as to prevent him disposing of the property in any way he liked and preventing the property coming to them at all. It is perfectly clear that it was, as regards them, obstructed property, because their title never arose at all until after the previous titles of the widow, and of the daughter, were disposed of; and if they had died before the daughter died, they would have had no right at all. None of that I dispute in the slightest degree; but what I do dispute is the inference that they draw from this undoubted proposition of something else, which is completely different. They argue that because a son can never possess an interest which entitles him to dispute his father's right of disposition in property unless it is unobstructed property in that father's hands, therefore no one can hold joint property with a right of survivorship unless it has come in that particular way. Their argument seems to be: wherever there is unobstructed property that property in the hands of those who ultimately take it is joint property with the right of survivorship. That is undoubtedly true. But it does not follow that wherever property is held by persons as joint property with a right of survivorship it must previously have been unobstructed property. The proposition is not a convertible one. All unobstructed property is joint property, with survivorship in the hands of those to whom it falls; but it does not, therefore, follow that all joint property with survivorship in the hands of those possessing it must previously have been unobstructed property. The universal affirmative is not convertible. All elephants are animals, but it does not follow that all animals are elephants. Now if I show, and I shall show by instance after instance, that there are numerous cases in which property is held by persons who have never received it as unobstructed property at all—in many cases persons upon whom it has never descended at all but who, notwithstanding they have received it sometimes without any descent, sometimes when it has descended as obstructed property—still hold it as joint tenants with a right of survivorship, then it is evident that I completely explode this inference which the Court derives from the fact that it was not such unobstructed

property as we could have had, and would have given us a right to interfere with a father, or grand-father, in his disposition. I quite admit that. They are confounding the two different cases of the rights of a person in a lower generation as against a person in the generation above him with the rights of a person parallel, in the same generation, as *inter se*. The right of joint property, with survivorship, cannot exist in a person in a lower generation as against a person in the upper generation, unless the property when it comes to him will have come to him in the form of unobstructed property. But as between parallel persons in the same generation it is no matter how it has come to them. If it has come to them in a manner which makes them joint tenants, then the joint tenancy carries with it *inter se* the right of survivorship; and that is the point that I have to establish.

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The next argument upon which they rely is the authority of these cases in *Gopalasami v. Chinmasami*, I. L. R., 7 M., 458, *Jasoda Koer v. Sheo Pershad Singh*, I. L. R., 17 C., 33 and *Saminatha Pillai v. Thanguthanni*, I. L. R., 19 M., p. 72 and so far as they go I shall show your Lordships that every one of those rests upon the same fallacy.

I think it will be more convenient to your Lordships if I first place before your Lordships all the authority there is, and these are the only other cases that deal with the subject, and then your Lordships, having before you this judgment, and the three previous judgments upon which it is founded, will be in a position to see what weight is to be attributed to the argument which I shall submit to your Lordships, namely, that there are numerous cases in which property, which undoubtedly never came to the receiver as unobstructed property, has still been decided, and decided by your Lordships in this tribunal, to be joint property with a right of survivorship.

The cases are in the 7 M., 17 C., and 19 M. I first take the 7 M. case. I cite them in order of time. It is 7 M. page 458. The side note is:—“The estate of a Hindu having descended” &c., &c., [Reads down to the words] “was competent to dispose of the estate by will.” That does not tell you very much.

Lord Lindley:—That is in your favour as far as it goes.

Mayne:—Yes. The facts are stated by the Subordinate Judge. In this case the question was not decided at all, but the

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decision did go upon the point, that in any case they held it as joint tenants. The judgment is at the bottom of page 459 :—“ At the hearing of this Appeal the only point urged was ” &c., &c., [Reads down to the words] “ but it is undoubted that co-parceners may so deal with property.” Your Lordship sees the previous point is not decided. Then they go on to the other point They deal with it exactly as the District Judge did in this case :—“ But it is undoubted that coparceners may so deal with property ” &c., &c., [Reads down to the words] “ on the contrary it is admitted without qualification that he and his brother were undivided in interest ” —Just as they are here, they were the sons of one father— “ and it was not pleaded that after the brothers inherit it ” &c., &c. [Reads down to the words] “ Under these circumstances we hold that the courts below were right in finding that the property in the suit passed by survivorship to Rangai Chetty.” This decision, therefore, is in my favour on the second point, and it is not against me on the first point, because the point is not decided.

Lord Lindley :—It is not very satisfactory.

Mayne :—No. I should not have cited it at all on the point of law except that it is one of the cases upon which the High Court rely. They say at line 22, page 2677 :— “ This conclusion drawn from principle is well supported by authority also. In *Gopalasami v. Chinnasami* (I. L. R., 7 M. 458) *Turner, C. J.* and *Brandt, J.* expressed a strong inclination against the applicability of the doctrine of survivorship to a case like the present”. I think they expressed no inclination one way or the other. They said it was a very nice point, which had never occurred before; and they did not intend to decide it if they could possibly help it. The next case is the really only important case of the series antecedent to this. It is in 17 Calcutta page 33. That was the same case. At the top of page 34 it says : “ The plaintiff claimed the property in dispute ” &c., &c. [Reads to the words.] “ The property passed by survivorship to Sheo Das ”. Then the appeal was “ Third : That the properties in dispute having been inherited by Kas. Varshad and Sheo Das from their maternal grand-father Kas. Varshad which was passed by the ordinary law of inheritance to his widow, and after his death to the plaintiff, the principle of survivorship not applying to such property ”. This is a Calcutta case, but it was under Mitakshara law. In the judgment at page 35.

it is said: "We come now to the third question" &c., &c. Raja Chelikani Venkayamma v. Raja Chelikani Venkatarain-anayamma. [Reads to the words] "is not of any of these descriptions." Now, the minor proposition I admit; what I deny is the major proposition. We have nothing to do with that. "According to the Rule laid down by the Privy Council in the *Shivaganga case*," &c., &c. [Reads to the end of the judgment.] Now, my Lord, as I said the beginning of this rests entirely upon what I say is the fallacy of the present judgment, holding that there is no sort of property of which it can be predicated that it is joint property with a right of survivorship except that particular form of joint property which has previous to its possession by the generation upon which it descends, been ancestral property in the hands of a father by virtue of which fact, under the Mitakshara law, the sons get an interest in it by birth each as he is born, which interest shackles the father in his powers of disposition over it. Then as to these two pages which deal with the rights of a widow, and some other parts which they refer to, I do not think they have any bearing on this. The whole discussion in the Mitakshara is as to what are the rights of the son during the existence of the father. The Dayabhaga lays down that a son has no right in the property of the father, however acquired until the father dies; that is when he is in the position of a son under English law. The Mitakshara working very much on the same premises arrives at an exactly different conclusion. It holds that during the lifetime of the father, if the property had descended again on that father from his father, then the sons get an interest in it which makes it descend upon them as what is called unobstructed inheritance. There is nothing in the Mitakshara to show that no other property is joint property with the right of survivorship except property that has so descended, and that is the question for them to establish. It is not sufficient for them to say to me you had no interest by birth in your grand-father's property; he might have disposed of it to any one he wished; he might have given it away by will or by gift in his lifetime; when you got it you got it as obstructed heritage and you had no title till the moment you did get it. But the question is when the two brothers who in point of fact were undivided brothers, living as undivided brothers in a joint family with themselves and their father, although that father had no interest in the property when they got it, did they hold it as

Raja joint tenants, and did that joint tenancy carry with it the right of
 Chelikani survivorship. There is nothing whatever in their argument to
 Venkayamma touch that question, and I shall show your Lordships that there
 Raja are numerous instances which exactly establish the contrary. Now
 Chelikani that is the whole of that argument.
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Then we come to the third, and the only other case upon that subject which is in 19 Madras, page 70. "The plaintiff, a Hindu widow" &c., &c. [Reads to the words.] "no co-parcener".—Here it is said the property descended not from a maternal relation but from a divided branch of the family, so that they took it as heirs and not by survivorship, and the question was as between themselves what was the position. The High Court says "We agree with the conclusions of the Subordinate Judge" &c., &c. [Reads to the words] "having another and distinct family property of their own."

Now my Lords, as far as the argument goes, it seems to rest entirely on the authority of the two cases in 7 Madras and 17 Calcutta. The only additional argument is this. They say: "To hold otherwise would be to recognise as co-parceners with rights of survivorship a group of persons who might be descended from different parents, and might at the same time belong to a larger group having another and distinct family property of their own." Perhaps as regards that argument it is sufficient to say that that is not the present case. This is the case of persons who are not descended from different parents, but they are descended from the same parents with the additional circumstance that in their own position, and as apart from this maternal property which descended upon them, they were in themselves members of a joint family, undivided as between themselves, and capable of holding joint property as members of a joint family. If there were persons who were sons of different daughters and of course by different husbands, the case would be different. Then the sons by one daughter could not be members of a joint family with the sons by another daughter married into a completely different family. Sons of two different families cannot form members of one undivided family. That is quite clear. Therefore none of the rules of Hindu law which apply to the tenure by sons of a single father, members of a single undivided family, could have any application to the tenure of the property

held by persons who belonged to completely different families, and could not possibly make themselves members of one joint undivided family. Therefore none of the rules of Hindu law—and the Mitakshara is the only one we are considering now—none of the rules of the Mitakshara law which provide that where a man who is a member of a joint undivided family dies, leaving a widow, and leaving other male members of that joint undivided family, any one of them shall succeed in preference to the widow—that principle could not possibly apply to a case of property which had descended to the sons of different daughters by different husbands, because they could not possibly form members of an undivided family. But whether the mere fact that the property had descended upon them at one time and by one title would constitute them joint tenants of that property, and it is a joint tenancy which, on the principle of survivorship inherent in joint tenancy would attach to them independent of Hindu law—whether that would apply to such a case is a very different question from the one now before your Lordships, and might raise very considerable difficulty. All I have to say is that that is not this case. This is a case of property descending at the same time by the same title upon two persons who are members of a joint undivided family, and, therefore, governed by the Hindu law applicable to such cases. And the question, therefore, is whether the mere circumstance that it descends upon them as unobstructed property shall make any difference in the case.

Now, my Lords, those are all the direct authorities on the case.

Lord Lindley :—If you are right, that case in 17 Calcutta is wrong.

Mayne :—Yes, certainly. I say that the case in 17 Calcutta is wrong ; that the case in 19 Madras so far as it relies upon it is wrong also ; and that the present case which relies upon all three is also wrong ; and that they have all gone upon the initial fallacy of assuming that that which is the attribute of one sort of joint property with survivorship must necessarily be the attribute of all joint properties with survivorship.

Having passed from those, I now proceed to show your Lordships what I say is the negative of that proposition. I shall proceed to show your Lordships a number of cases in which property

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anayyamma Lord Lindley :—Have you cases of what you call obstructed property ?

Mayne :—Oh yes ! half a dozen, one after the other.

Now, my Lords, first take one of the most common cases possible. A father has come into the world without any property ancestral or otherwise. He makes a very large fortune which in his hands is self-acquired property. He then has a number of sons born and living with him as members of a joint family, but the whole of his property and the whole of any property there is except what they may have made for themselves, is his self-acquisition. Now it is perfectly certain of course that he may do any thing he likes with that self-acquisition. He may give it away ; he may will it away. The sons have no interest whatever by their birth in that property. If he makes no will, it will descend upon them, and it cannot descend upon any one else in the case of intestacy. It will descend upon them as obstructed property and not as unobstructed property. But in their own hands it will become joint property with the benefit of survivorship. For that I shall refer your Lordships to a decision in 20 Weekly Reporter, page 189. At page 191, Mr. Justice *Frere* says, “ The distinction between a joint property and a separate property under the Mitakshara law”, &c., &c. [Reads to the words] “ the enjoyment of the property to his family representatives.” That does not apply to this case.

The law is laid down very similarly in a passage in the 9 Bombay Reports, page 450 in which they say it is no matter how the property has come. When it once gets by descent into the hands of a joint family it becomes joint property with all its incidents. This authority is quite sufficient for my purpose.

Sir Ford North :—What is the date of that ?

Mayne :—That is in 1872-3.

Sir Ford North :—What is the date of the 9 Bombay case ?

Mayne :—I cannot tell your Lordship exactly the date.

Now, my Lords, take another case. Take property granted—a gift—to two members of a joint family—that it is held and is taken by them as joint property with benefit of survivorship.

There there has been no descent at all. It never descended to them; it never was unobstructed heritage as regards them. Its origin consisted in the grant of a stranger. I shall show your Lordships that in that case it has been held that the members held jointly with benefit of survivorship.

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Lord Lindley :—That is not a case of descent at all.

Mayne :—No, it is still stronger. That is a case in 3rd Bombay 151. [The learned Counsel read an extract from page 152]. That, therefore, was a case of two brothers, members of course of an undivided Hindu family to whom a grant had been made by the Government for the services of their father. They were held not to have ever become separated; therefore they continued in jointure. One of the two died leaving a widow. She claimed half of it upon the ground that they were separated. The separation was found never to have existed, and the other brother was held to have the whole on the ground that he held by survivorship.

Lord Lindley :—I do not quite understand this. The terms of the grant were unknown; it was held jointly, and a little lower down it says they held as co-parceners.

Mayne :—Co-parceners and jointly are the same.

Lord Lindley :—Co-parceners according to our idea is by descent.

Mayne :—Your Lordship will see that in this case there is no such word as co-parcenary in Hindu law. Co-parcener is a phrase that we assign and use and that is used by the translators to represent the idea of persons who are living together, holding property as members of a joint Hindu family; there being no separation. Your Lordships will see exactly how the argument arose by the argument for the plaintiff at the bottom of the page. They say "We admit that the village is not ancestral property" &c., &c. [Reading an extract]. Then the Judgment of the Court is as follows: [Reads the Judgment of the Court].

Now, my Lords, there is a perfectly similar case in the 20th Indian Weekly Reporter, 197. In that case there were three undivided brothers and a gift was made to two of the undivided brothers to the exclusion of the third. Then one of the undivided brothers one of the grantees, died leaving a widow. The widow, as in this case claimed half of the property, as heir to her husband. It

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anayamma. was under the Mitakshara law again. The brother claimed the whole, being the second grantee—he claimed the whole by survivorship, and the third brother claimed half of it as being heir to the brother who died, under a rule of law as to a separated brother. He claimed it as separate property. That argument was disposed of by the Court and on page 201 they say. “We think, therefore, that the rule of succession propounded by the respondent’s pleader”, &c., &c. [Reads to the words] “on the facts it must be taken as absolutely subsisting” and accordingly they handed over the whole of the property to the surviving brother.

[*Adjourned to the next day at 10-30*].

SECOND DAY’S PROCEEDINGS.

Mayne:—My Lords, there is another class of cases in which brothers hold property jointly which they have not got by inheritance, and that is the case of brothers who have come into the world without any money at all and then labour together and jointly acquire money, and that grows and grows. That is joint acquisition with all the privileges of survivorship attached to it. I suppose no one will dispute that; but there is a decision of your Lordships to that effect in 10 M. I. A. 490

Lord Macnaghten:—I do not think you want authority for that.

Mayne:—I just give your Lordships the reference to it.

Now I come to a class of cases that I think bear very directly upon this question, namely, the class of cases which are in the direct line of succession which your Lordships have to consider in the present case. As your Lordships know, when a man dies without having direct issue and without being a member of a joint family of which any male members are still in existence within certain limits and under the Mitakshara law, his first heir is his widow; his second heir is his daughter and his third heir is his daughter’s son. Now every one of these when they take, take what is called an obstructed inheritance; that is they have no vested interest in the property until the time at which they take it. The father may do anything he likes with the property, give it away, will it away, or anything he likes. When they take they take an obstructed inheritance and they do not take at all unless each of them happens to be in existence at the proper time when the inheritance falls in. Now

that is what has taken place in this case. First it went to the widow, Raja Chelikani then the daughter, and then the sons of that daughter. In this Venkayamma case there were only one widow and only one daughter. But what happens very constantly is that there are several widows and several daughters. And it has been decided in this tribunal on several occasions that in each of those cases if there are several widows they take a joint estate with survivorship. If there are several daughters, they also take a joint estate with survivorship. And that being so, it raises a very natural inference that when you come to the third line of succession, the sons, they would take a joint estate with survivorship. At all events the fact that the estate that they take is an obstructed and not an unobstructed one cannot be a valid argument against them, if it has not been against the widow. Now I shall refer your Lordships to the cases upon that point. First of all I take the widows. The first case is in the 11 M. I. A. The case begins at page 487, but the passage I refer your Lordships to is at page 514. "Their Lordships have now to consider whether the effect of the so-called partition." &c., &c. [Reads to the words] "to enter into such a contract"--Then further on they say: "If this be so it follows that the opinions of those pundits." &c., &c. [Reads to the words] "there can be no alienation of one without the consent of the other." My Lords, there does not seem to have been a great deal of discussion in that case; but the matter was very considerably discussed afterwards in a case which came before your Lordships arising out of the well known Tanjore case, which followed upon the annexation of the Tanjore Raj. In that case the Government had seized not only the whole of the state property but they had seized an immense quantity of personal property of the Rajah and the Ranees. The question arose in the Indian Courts, as to whether the seizure was good as to that, and it was decided here ultimately contrary to the opinion of the Court of Madras that that was good as an act of state. What took place after that was that the Government then did what they said they always intended to do; they divided the purely personal property from the state property, and they gave back the personal property to the widows to the amount of about a million of money nearly. Then a question arose as to the rights of the widows *inter se*. It came first before the Madras High Court, and they decided that the gift by the Government to the widows was a gift intended to

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anayamma. inure to them as widows and for a widow's estate, and they went very elaborately into what all the rights of a widow would be under those circumstances, apparently, as well as I remember, without having made any reference to your Lordship's previous decision. By the by, the 11th Moore was not a previous decision, it was a subsequent decision. But at all events they decided it on pure questions of Hindu law. There was a very elaborate judgment upon the whole point. The decision is at page 424. The ultimate conclusion is at page 452 of the 3rd Madras High Court Reports. They went into the whole law of the question *a priori*. I need not read the judgment of course, because it was afterwards confirmed by your Lordships. At page 452 they say "On a review of the authorities" &c., &c. [Reads to the words] "and we shall accordingly declare the rights of the widows in this suit."

Lord Lindley :—Is that a Mitakshara case?

Mayne :—Yes ; all the cases in Madras are Mitakshara cases.

Now, my Lords, that case came on for consideration before this tribunal in the 4th Volume of the present Indian Appeals, page 212. There they affirmed that decision of the Madras High Court. The final passage in the judgment is at page 221. They go again through the whole of the authorities upon the case treating it as if it were *res integra* and at page 221 they say : "Their Lordships think that in this state of the authorities they would not be justified in treating the Tanjore case"—(That is the one in 3 Madras)—"as improperly decided or in dissenting from the proposition which the learned Chief Justice finally expressed in these words. On this review of the authorities we come satisfactorily to the conclusion that the sound rule of inheritance is that two or more lawfully married wives take a joint estate for life in the husband's property, with rights of survivorship and equal beneficiary enjoyment." And then they come to other questions as to the right to make a partition *inter se*.

The same question also arose comparatively recently in this Court in the 19th Indian Appeals 184 where the question simply was this. There were two widows who had held property between them and one of them assigned her share in the property as she said for a necessary purpose for paying off debts. Your Lordships held

that her assignment was invalid without the consent of the other widows, defeating her rights of survivorship. The case begins at page 184. The passages to which I refer your Lordships are pages 187 and 190, page 187 is the description of some facts which arose out of it. This is at the end of the judgment. "It may be assumed for the present judgment without deciding the point" &c., &c. [Reads to the words] "affect the interest of his surviving widow" "so that it is as clear as possible that in that case the widows take a joint estate with survivorship."

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The same applied as to daughters. In Madras this question as to daughters came on, and it was there I think *res novo*. It is in the 6th Madras High Court Reports, page 310. That was the second Shivaganga case. The side note is "Unmarried or married daughters on whom as a class paternal property devolves take a joint life interest with rights of survivorship." There is a very long judgment arguing the whole thing out, but ultimately the decision is set out at page 333. That is a case in which I had the misfortune to appear on the wrong side, as I did in every instance in which the Shivaganga case came on. I was always on the wrong side. In that case I had relied on the passage which is referred to in the present suit. They sweep that aside and they say—

Lord Lindley :—Did that case come before this Board?

Mayne :—That case did not come before this Board, but the decision is referred to and affirmed in a case which did come before the Board. Yes, my Lords, I find the case itself came before this Board. This is the ultimate upshot of the judgment. "For these reasons I am of opinion that unmarried or married daughters on whom as a class paternal property devolves, take a joint life interest with rights of survivorship. The estate of inheritance passed from the father to the sons of all the daughters as his nearest heirs, and on the death of the last surviving daughters her sons take the property equally and consequently the plaintiff being the eldest surviving grandson of the Istimirar Zemindar is the heir."

Then, there is a case in the 2nd Law Reports Indian Appeals, page 113. The case in the 2nd Indian Appeals is not the case on appeal from that. It is a case from Calcutta. At the bottom of page 125, the Court says "The question then resolves itself into this" &c., &c. [Reads to the words] "she would at that time have been

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incompetent to take by inheritance from her father". I think the Shivaganga case was ultimately decided before your Lordships in the case I gave the reference to yesterday, 8 Indian Appeals 99.

Lord Lindley :—This case in the 2nd Indian Appeals was not a Mitakshara case, was it?

Mayne :—Yes, it was a Bengal Mitakshara case. Your Lordship knows that in Bengal, except in Bengal proper, the Mitakshara law prevails. It is there called the law of Benares. It would be still stronger if it were a Dayabhaga case.

Now, my Lords, these are the authorities that I have to place before your Lordships, and I submit especially upon these last when we come to deal with the same line of descent, that it is impossible to hold that a different rule of succession would apply to the sons from that which would have applied to the wives and the daughters. The daughters' case is a particularly strong one because in the case of daughters unless they happen to die in childhood the daughters are always married, and they must be married into a different family from their father. They must be married within the caste, but without the family; and unless the several daughters happen to marry brothers or members of the same undivided family, which of course is possible, but does not very often happen, the daughters would be actually members of different families and, therefore, would be incapable of forming members of a joint family; but the law evidently regards them in their origin at the time antecedent to their being transplanted out of their family into another family, and it governs their rights and gives them rights of joint tenancy and survivorship with reference to the fact that as daughters they were members of the same family incapable of forming members of a divided family.

I submit, therefore, that the decision in 17 Calcutta and the decision in this case which is founded upon and follows the same line of argument as that case have been wrongly decided. They are founded upon two propositions. The first proposition is that unobstructed property is taken as joint property with survivorship. That is a proposition which is perfectly true, but is utterly irrelevant to the present case. The second proposition is the converse of that proposition, namely, that all property which is held as joint property with survivorship must have been taken as unobstructed in-

heritance. That is logically unsound, and as I think I have demonstrated, it is untrue in fact. It is a perfectly relevant proposition from which the conclusion would follow, but it happens to be untrue. Therefore I submit that the whole argument of the High Court in Calcutta and in the present case falls to the ground; that the first authority in 7 Madras decides nothing; and the case in 19 Madras is merely rather a perfunctory following out of the decision in 17 Calcutta. As far as authority goes the whole authority rests upon these decisions. There is no native authority upon this subject unless by inference, and the inferences from the nature of the authority have been worked out in Madras and by your Lordships to a completely opposite conclusion. Therefore, I submit that I have established upon this head that it is not a true proposition that there can be no joint tenancy with survivorship unless that has been the result of a previous descent of an unobstructed inheritance; on the contrary that I have established in case after case that there will be joint property with survivorship in cases where the descent has been of obstructed property, and in cases where there has been no descent at all, where the property has been received by gift, or where the property has been jointly acquired.

Now, my Lords, I pass to the next question, the question of fact which assumes that your Lordships' opinion is against me upon this point.

Before going into the evidence it may help your Lordships as to the points to which to direct your attention if I say very shortly what I think are the different points which that evidence establishes. First, I think it establishes that before and after the minority of Appa Rao all the dealings with the officials were conducted by the brothers on the footing that they had a joint interest. Secondly, that during the minority of Appa Rao, Niladri, although his father was still alive, for the father survived Niladri by a few months, all along acted as the guardian of Appa Rao. Now the father is the natural and proper guardian of his son, and I think the only supposition upon which it can be accounted for that Niladri, the brother, should have acted as the guardian of his brother is that Niladri was looked upon by common consent as being the managing member as the elder of a joint family property in which he and Appa Rao were jointly concerned. A third point which, I think, is

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important is this that at the end of the minority when Appa Rao succeeded into the possession of his rights there was no accounting as between himself and Niladri, the elder brother. That is, of course, exactly what would take place if it were joint property. If it is a joint property, there is no accounting from day to day or from year to year to any of the members of the family. The property goes on accumulating in the hands of the manager, the disbursements go on rolling up at the will of the joint manager and as each party comes into his interest in the property and interest in possession he takes the property as he finds it, and as your Lordships know also, if there is a partition there is no going back for accounting. The property is divided as it is unless you can show fraud or defalcations, or anything of that sort. But if the interests were separate, if each of them was a tenant in common so that although the shares were undivided the shares as to their quantity were ascertained and the interest of each was separate, then the elder brother, the guardian, would have been managing, not as manager of the joint family property, but as trustee and agent for the younger brother's interest and when that interest came into possession he would have had to give an account to him as trustee. He would have had to show what he had properly received; he would have to show what he properly expended on his account, or for charges which were properly debited against him.

Now, my Lords, there was a recent case before your Lordships in the 26th Indian Appeals, page 167 which illustrates that difference. That was a case in which there had been a partition of money apparently for the sake of getting rid of one member and then after the partition the remaining brothers agreed that the elder of the remaining brothers, all except the one should be put into management of the property and so it went on for some time; and there were particular words in the arrangement which led this tribunal to hold that it was not a restitution of the joint property; but that the manager was holding as a trustee and agent for all the others. When the final partition was made, a question arose as to the principle upon which the accounts should be taken, and it was contended that the accounts should be taken upon the footing of its being a restitution of the original joint family and that, therefore, no accounts, no separate accounts, as between each of the members and the manager should be taken, but that it should be dealt with

as an ordinary joint family is dealt with upon the footing, take it as it is at the time of the partition with its outgoings, its incomings and its practical results. But your Lordships held that that was not so because the person was managing not as manager of a joint family, but as trustee for a number of persons whose interests although not separated had become partitioned though not divided by metes and bounds. I should say, therefore, that they were all holding as *quasi* separate members amongst each other; and that, therefore, the account should be taken as between trustee and agent.

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Well, my Lords, I say the fact that no accounting of that sort took place here, or was ever suggested as a proper thing here at the time that Appa Row's minority ceased, is again a very strong indication that the management was a management for undivided members of a joint property and was not management by one of two tenants in common of separate estates of each.

Sir Ford North :—When did Appa Row come of age?

Mayne :—I shall be able to show your Lordship when I come to it. Then, lastly, the evidence shows that as one might have expected from their being members of a joint family as between themselves and their father the brothers were living together in the most absolute form of a joint family. They were living together; they were joint in residence; they were joint in food; they were joint in money; they were also joint in all their transactions; and all the accounts of receipts and expenditure were carried on upon the footing upon which they would be in a joint family and not upon the footing of persons who had separate interests. There was no separate account. The accounts I shall show your Lordships were very elaborately kept. They were divided and sub-divided under all sorts of headings, but the receipts were all carried into a common stock. The expenses were all carried out of that common stock and they were equally carried out without reference to whether they were for Niladri or for Appa Rao and Niladri's expenses in point of fact were considerably greater than those of Appa Row; because Niladri had a larger family than Appa Row had. But no distinction was made. There was the common source from which the property came credited to a common account; the common object for which the expenses were incurred, namely, the joint mem-

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bership, debited against the common account without distinction of different purposes. Now, my Lords, that is what has always been regarded as one of the strongest indications of a joint family as Lord *Westbury* said in that well-known judgment of his in 11 Moore's Indian Appeals, page 75. The passage I refer to is at page 89 : " According to the true notion of a Hindu family in Hindu Law no individual member of that family while it remains undivided" &c., &c., [Reads to the words] "although the property itself has not been actually separated and divided." The latter is the position that the High Court said we occupied; the former is the position that I say we occupied; and all the accounts and all the dealings are in conformity with that state of things.

I think I may now answer your Lordship's question, I think it was on the 15th October 1889 that the minority ended. The letter is in October 1889. * * * *

I say in every conceivable way in which you can show that people were living together as joint members, it is shown, and there is nothing to show the contrary. The High Court does not seem to dispute the facts. The original court relies upon all this and says they were living and intentionally living as members of a joint family. The High Court does not dispute this, but what it says is in point of fact they were tenants in common. They knew perfectly well that they were tenants in common and they had no intention to be anything but tenants in common, but they were carrying on this joint mode of dealing simply for their own convenience until they chose to separate and not to enter into a partition, because that, of course, members of a joint family can do whenever they wish, but until they chose to realise in an external and objective way the separate interests which they were really holding the whole time. I think there is not an atom of suggestion of anything of the sort. If I may suggest it, it seems to me the idea of their having separate interests never occurred to these people's minds. I do not suppose you could have got them to understand the difference between a tenancy in common and a joint tenancy; probably it would have been impossible to make them understand it. They were an undivided family and they were living as an undivided family. Then they got this windfall of the large estate coming from their maternal grandfather and they took it to themselves and dealt with it, and treated it, and no doubt, considered it as

being joint family property. It may be said that was a mistake, but to suppose that they had ever read this decision of the Calcutta Court, and framed an opinion in their own mind that they were holding in this mysterious way, differing from how they would hold other property, never occurred to their minds. If there was any mistake on the point, it was a mistake of law common to both, but it was not a mistake of law which was any fraud or injury to either party. No doubt it had the result that if one died his share would not go to his widow but to the surviving brother, but that was an equal benefit to the other too, and I say the original court was perfectly right in saying that upon the whole of these transactions there cannot be the slightest doubt that whether they were right in law, or whether they were wrong in law, the brothers considered they were joint members of joint property exactly as if it had come from their own father, that they dealt with each other and with the public upon that supposition, that was the belief they had and that was the belief they acted upon, and in all these acts they were intending to act not as tenants in common who were preserving *in petto* and *sub rosa* a distinction of interest different from that which really appeared by their mode of acting, but that they were acting in accordance with that which they believed to be the fact and which they intended to be the fact, and if so I submit that upon that point again the original court was right and the High Court was wrong.

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That I think concludes my argument, my friend has got an opposition appeal of his own, and, of course, when it comes to that, I shall have a separate right of dealing with that.

Jardine :—May it please your Lordships, I think in this case it will probably be more convenient if before dealing with the separate appeal which I have on the question of revocation, I follow the arguments which Mr. Mayne has addressed to the court in the same order in which he has addressed this board.

The first point that arises is what is the nature of the estate which a Hindu daughter's sons take, what is the nature of the heritage? It is argued before this Board that heritage is of the nature of an unobstructed heritage; that it carries with it, at least, all the incidents of an unobstructed heritage in Hindu Law.

Mayne :—Do you say that I argued that?

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Jardine :—I say that it carries with it the incidents of an unobstructed heritage in that the right of survivorship is there existent.

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Mayne :—I did not say it carried the incidents of an unobstructed heritage. I said it does it incidentally "from the fact" that it was joint property utterly independent of the "unobstructed." I have been trying to get rid of the connection.

Jardine :—I am sorry if I misrepresented my friend's argument. I do not think any confusion will arise if I develop what I propose to say upon the subject. So far as the actual authority upon this subject is concerned the authority is all in my favour. The case in which it has been considered at considerable length is that one in 17 Calcutta which has already been cited to your Lordships. That case has been followed by the Madras High Court in 19 Madras, and in the present judgment, which is now, of course, before this Board for possible correction. Somewhat independently the same conclusion is arrived at by the Judges in the court below. The conclusion that is arrived at is that the sons of daughters take an estate without the incident of survivorship that they take an estate with individual ownership of each of the class to which the estate devolves. As to the reasoning of the learned Judges in arriving at that conclusion it is unnecessary for the conclusion that I should adopt the whole reasoning although I propose to argue that the propositions laid down in the Calcutta High Court are correct, namely, that this incident of survivorship arises in the cases of unobstructed heritage and of accretions to such joint estate and, in the second instance, which we need not consider that of reunited coparceners.

Now I understood my learned friend to suggest that to a Hindu the notion of, to use the English terms, "tenancy in common" would be a difficulty; that it would be somewhat difficult for a Hindu to grasp such a notion. I do not know whether I misunderstood my learned friend. At any rate I submit that that cannot be the case at all. All Hindus who are under the Dayabhaga for example must be perfectly familiar with an estate which has the same incidents as that of a tenancy in common with us. Under the Dayabhaga you have joint family estate. You have the family forming a corporation as

one may call it holding the estate, but with individual rights in their several portions with individual interests without any right of survivorship at all. When a member of a family owning a joint estate under the Dayabhaga dies, the estate is not taken by the remaining members of the family or the corporation, but it goes to his immediate heirs as though it were the separate and self-acquired property of a Hindu. That idea then must be very familiar in Hindu Law. On the contrary, as I submit, the joint tenancy as understood in the English Law is not known to the Hindu Law. I do not mean to say that by an act of parties a relation similar to that of joint tenants under English Law cannot be created between Hindus, but by the Hindu Law in itself and by the Hindu Law books, that joint tenancy as we would understand it, is not a Hindu estate. There is under the Mitakshara a peculiar estate created by those who are under the Mitakshara Law whereby family property descends to the family as a corporation, or as a body of persons who do not take individual interests in the estate, who take it as a corporation and having so taken it the property does not devolve on the death. Of course that is the ordinary familiar incident under the Mitakshara. It does not devolve on the death of a member to his heirs, but belongs to the corporation which from time to time is increased by births or diminished by deaths. But that is a peculiar creation of the Mitakshara. As I submit such incidents which belong to an estate of this kind are not to be extended generally, and are not to be extended, in fact, beyond such positions for which the Mitakshara has provided. The Mitakshara has carefully gone into this subject of the nature of this estate, also as I shall submit the reason for such an estate being existent, but at any rate I submit that there is no reason why one should either assume or expect to find an estate with similar incidents as to survivorship except where, as I say, it had been adduced from principles and laid down in the Mitakshara as existent.

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Now what is the underlying idea in the Mitakshara from which the author of the Mitakshara adduces this peculiar estate? It is from the right which is elaborately established of a Hindu on birth to an interest in his paternal ancestor's estate up to three generations. That is what the author of the treatise first addresses himself to, and establishes that a Hindu on birth acquires an interest in the estate of his father, of his father's father, and of his father's

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father's father. And from that flows the incident of this peculiar estate. Having so acquired it by birth he, and these various others have an interest. It need not always be a life interest that is an equal interest but they have an interest in this property, and therefrom arises the peculiar tenure with especially the incident of survivorship. In the case in my favour in the Calcutta series they lay down that it is only in such cases that the incident of survivorship arises. Now it has been argued by my learned friend with regard to that that there are various other cases in which such an incident arises which would not satisfy the definition as laid down by the Judges of the Calcutta High Court. The first instance cited is that of the self-acquired property of a Hindu devolving upon his sons, as my learned friend argued that self-acquired property in the hands of a Hindu is his property to do what he likes with. That I think is the argument: that he can dispose of it or alienate it as he chooses, and that the sons could not prevent the alienation of such property; and that therefore when it descended upon them, descending upon them as an unobstructed heritage. It is laid down in the Mitakshara it does with incidents of survivorship. That was in contradiction to the rule as laid down in 17 Calcutta. Now, I submit that that is not quite the case. It is true that a Hindu has very large powers as regards alienation with respect to self-acquired property; but it is also the case that under the Mitakshara a son acquires an interest in the self-acquired property of the father, as well as in the property of the father which has descended from the father's father. He does not acquire an equal interest with his father in the self-acquired property. He does not acquire that equal interest which gives him power to demand a partition of the ancestral property that has devolved upon his father at any time. With regard to the ancestral property he could demand a partition at any time against his father. With regard to self-acquired property he cannot do that. That does not prevent his having acquired under the Mitakshara a right by birth in such self-acquired property, he, under certain circumstances, being entitled to demand a partition of such property. I am only concerned with this that the exception which my learned friend claimed of such property, of self-acquired property being unobstructed heritage in the hands of the sons.

Mayne :—No, being obstructed property, self-acquired property is obstructed inheritance.

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Jardine :—Obstructed inheritance with a right of survivorship. What I say is that that does not militate against the rule laid down by the Calcutta High Court, because these sons have acquired a right by birth in such self-acquired property.

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Lord Macnaghten :—What right by birth do they acquire? I do not quite understand what the right is.

Jardine :—Then I will refer to the text upon that. It is a right which, no doubt, is, ordinarily speaking, not of great practical value. The parent can alienate, but that the right exists theoretically, I submit, is clear under the Mitakshara. The text I would refer to upon that is in the Mitakshara, chapter 1, section 1, placitum 27. "Therefore it is a settled point that property in the paternal or ancestral estate is by birth"—I believe the correct translation is "Grandfather's estate" but still—"in the paternal or ancestral estate is by birth; although the father have independent power," &c., &c. [Reads down to the words] "in regard to the immoveable estate." That lays down that the property in the paternal estate is by birth. It does not limit the paternal estate to estate acquired by the father by devolution from a higher ancestor. The paternal estate is general in that case.

Lord Macnaghten :—What is the meaning of that: can he do anything to prevent his father disposing of it?

Jardine :—In certain cases which I shall come to directly, in a further text, where the father is addicted to vice.

Lord Macnaghten :—That is to say, when he is unfit to manage his own property?

Jardine :—And various other matters.

Sir Ford North.—It means that the son has an interest during the father's life in whatever the father may leave on his death?

Jardine :—He acquires an interest by birth in all the estate in the hands of his father, as I have put it. With regard to such estate as in his father's hands was ancestral he can prevent an alienation. He has an equal right. With regard to self-acquired property he cannot, ordinarily speaking, prevent his father alienating that self-acquired property.

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Lord Macnaghten :—He cannot prevent his father alienating it so long as he is in a fit condition to alienate ; and he cannot prevent his father willing it away.

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Jardine.—The reason given is that he has an interest by birth.

Lord Macnaghten :—I do not understand that interest.

Jardine.—I do not put it as of very high value.

Lord Macnaghten :—He is his father's son, and if his father does not dispose of it, it will come to him ; but is it anything more than a *spes* ?

Jardine :—I take it, it is more than that. In its practical effect, I do not take it to be more than that. From the point of view of a Hindu lawyer I take it to be more, because they deal with the reason why you can prevent his alienating the ancestral property and not the other property. Later you have an interest in the whole property, but the interest varies. You have an equal interest in the ancestral property. Because your father has the predominant interest you cannot prevent alienation, but in certain cases you can even oblige a partition of the self-acquired property.

Sir Ford North :—Rather a good illustration of the *scintilla juris*.

Lord Lindley :—You say the son has an interest. Has he got a commercial interest ? Can he sell it or mortgage it ?

Jardine :—I do not think it would command very much. I take it it is perhaps not of money value.

Lord Lindley :—According to our Law an eldest son has no interest in his father's property. You think he has a chance of getting something.

Jardine :—I will just refer to the placitum on the subject which is chapter 1, section 5, placitum 10. "Consequently the difference is this, although he has, a right by birth" &c., &c. [Reads down to the words]" "dissipating the property." He has acquired a right by birth in it but he must acquiesce in his father's disposal of the self-acquired property : because the father was the acquirer of such property. In chapter 1, section 2, placitum 7, are laid down the conditions under which he can have partition :—"One period of

partition is when the father," &c., &c. [Reads down to the words] Raja
 "against the father's wish," and so forth. It is rather a side issue Chelikani
 with regard to that; but what I submit is that that renders the Venkayamma
 illustration given as an exception—not an exception to the rule. Raja
 It may be a shadowy right but a right by birth in the father's Chelikani
 estate in self-acquired property to inherit it, and inherit it as a Venkataram-
 joint family with the right of survivorship. anayamma.

Well then, my learned friend cited a case from Bombay of a grant to two brothers of an Inam, 8 Bombay, page 151.

What I have to say with regard to that is it was there dealt with in this manner by the court on special appeal. We have not the grant before us. We have the fact that a grant was made of an Inam to certain brothers; and the court came to the conclusion that such grant, had it been made in this country, or under English law, would have created a joint tenancy with personal right of survivorship. All that that case decides is that they see no reason why the same construction should not be put upon it when the grant has been made to Hindus.

It is rather whether an estate which could have been so interpreted in the English Courts may be similarly interpreted. Whether there is any reason to prevent its being similarly interpreted because the recipients of the Inam were Hindus or not, the court comes to the conclusion that they see no reason why such an estate cannot be equally created carrying with it the incidents of joint tenancy when the recipients are Hindus.

We come to another class of cases which my learned friend referred to, and those were the cases of widows and daughters. In both those cases one has the right of survivorship, the widows' class or the daughters' class who take on the death of a sonless Hindu. Now I take it that the analogy which was sought to be made between a right in such a case and that of the daughters' sons is an analogy which does not exist. The widow takes not an estate of inheritance but a life estate, or a widow's estate. A life estate is somewhat misleading. But a widow's estate is one terminable on death. It is not an estate which is alienable. It is a life estate. It is held to be one estate to the class of widows. They are looked upon as one unit. Precisely the same remarks apply to the daughters who also take not an estate of inheritance but life estates. It is looked upon as one estate to the class.

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In the case in 2 Indian Appeals which my learned friend cited, that was distinctly intimated in both cases, both with regard to the widows and to the daughters. Therefore, I submit that it is not an analogy with the case of the daughter's sons, who take an estate on inheritance, who take, as I submit, individual rights in the estate, but at any rate who take, whatever it may be, no limited estate, such as a widow's or daughter's estate but a full estate with powers of alienation and right of survivorship. An indication as to the nature of the estate is to some extent afforded, as I submit, by the fact that daughter's sons take *per capita*. If there be three daughters, each leaving families, the families do not take *per stirpes*, the sons do not take in groups of one-third interest for each groups but the whole class of daughter's sons take equally *per capita*. I do not wish to push that further than it is worth, but that, as I submit, does point to individual interests rather than to a joint estate—the fact that they are considered not as a class or as a group of classes but as individuals forming a class, each taking the same equal interest in the inheritance.

Well then, another consideration is this that if it were held that the sons of one daughter should take a joint estate in such an inheritance, you get a different estate taken by them than if the group consists of sons of two daughters—of more than one daughter. These two persons, Niladri and Appa Rao, were the sons of one daughter, and were therefore capable of holding a joint estate together, but they might have been the sons of sisters in which case there can be, of course, no contention that they take other than an individual interest in their particular shares.

Mayne :—I do not admit that. I said they could not take by virtue of Hindu Law, they might take as being joint tenants. I think it would be a difficult point.

Jardine :—At any rate it would raise a very great difficulty. Of course that is a point which would be too large a point to argue at length now, but at any rate very considerable difficulty would arise in such a case.

Then another matter that has to be considered would be the analogy so far as one can draw an analogy from another inheritance, namely, the inheritance of sister's sons, a somewhat similar inheritance, where a Hindu dies leaving neither sons nor daughters

childless, the inheritance proceeding to the sons of his sisters. The ^{Raja} ^{Chelikani} case has not arisen but they again take *per capita*; and in such a ^{Venkayamma} case as that the sister's sons only who are living at the time of the ^{Raja} ^{Chelikani} estate opening would take. One might be led into this result that ^{Venkataram-} ^{anayamma.} certain brothers who happened to be alive at the time of the death would take and hold jointly a certain estate, and a subsequently born brother would be outside this joint family estate, although he would be united with them for other purposes. It is a somewhat curious result. I do not say it is an impossible result, but so far as it goes it points to the individual interest rather than to a joint interest taken by the group who inherit.

Then what reason is there why merely because the persons who become entitled to inherit from collaterals, or to inherit from other than the direct paternal line, merely because they happen to be united in the relationship of brothers, why should one seek to give their estate certain peculiarities which are in the Mitakshara laid down for an estate inherited from paternal ancestors? The reason that might exist in the one case does not exist in the case of the inheritance from a collateral, because it must be put, I take it, so high as this that any property inherited by joint brothers must be held by them as though they were inheriting paternal property under the Mitakshara. At any rate I submit it is a strong argument to advance against such a contention that though we have the incidents of the Mitakshara joint estate laid down in the Hindu Law Books, there is no text which could be cited to support the proposition that the property to which Hindu brothers succeeded is to be held with the incidents of survivorship. There is no text, and my learned friend cites no authority. The authorities are in my favour upon that point. Those, I think, are the considerations which I have to urge upon this part of the case.

Lord Lindley :—You say there is no authority to say that Hindu brothers take jointly. Is there any authority either way?

Jardine :—The 17th Calcutta—only that sons and daughters.

Sir Arthur Wilson :—But does not your contention come to this: that nothing is subject to survivorship which has not been taken by survivorship?

Jardine :—In the self-acquired property of a Hindu descending to the sons survivorship would exist.

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Mayne :—No, it would not.

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Sir Arthur Wilson :—If it comes to that, does not your contention carry you to this : that there is no possibility of creating a joint family?

Jardine :—I think it comes to this that a joint family is existing or not existing. You cannot create a joint family. It is a fact whether a joint family exists or not you cannot create a joint family. Of course one knows one cannot create that amongst strangers. Strangers could not unite and say : " We will form a family." Also I take it that if you cannot create a family it would come to this. You may under the Mitakshara provide for the case of partition and reunion of certain members of the family ; but that is specially provided for. That is not the creation of a new family. One may look at that in two ways ; as a partition and division of a family, and reunion of the members ; or as a means of allowing a member of the corporation to leave the corporation. Beyond that I take it you could not create a new joint family. There is a case somewhat upon that in the next portion of the case to which I shall refer.

The next matter that I come to is a question of fact whether or not, assuming this to have been taken by the brothers as tenants in common, to use a convenient expression, by their conduct, by agreement or otherwise, they have altered the nature of the estate into that of a joint estate. With regard to that I would first point out that the mode in which a joint estate is managed under the Mitakshara or shall we say a joint estate under the Dayabhaga where there is no incident of survivorship at all, which corresponds to what we call a tenancy in common as against a joint tenancy, the mode of management is the same. So long as the property is held in community the actual method of management does not differ. There is a manager for the family. There are no accounts taken from time to time, although in a family under the Dayabhaga the different groups have their own separate interests, and separate shares ; but so long as they chose to remain in common there would be no difference in the manner in which the estate was managed from that which would obtain in the case of a joint estate under the Mitakshara. That is the first general consideration which I would point out.

Then the mode of account in all such cases, until some members of the family find that their interests are suffering by other members getting a very considerable amount of greater advantage out of the family estate than themselves and think it advisable, therefore, to have a partition, is this. You do not take into account differences, which generally are very minor, in the family living altogether under one roof; and in India the fact that one eats more than another, and the maintenance costs more, are matters which, according to Hindu feeling, would not be considered until they arrived at such an important difference as to drive one or other members of the family to seek partition. Now in this case we see from the evidence the whole difference of expenditure could not be very much between the two brothers. We see the whole family expenditure for maintenance was I think put down as only Rs. 2,000, and I do not suppose that the difference was such as to be a matter considered by either branch of the family, whether one had more children than the other, and so forth. That is a matter which obtains throughout the whole length and breadth of India—little differences of that kind. Well now, these accounts have been kept for a very considerable number of years; and there is no change in the manner of keeping the accounts. Assuming that they inherited this as tenants in common in 1884, at which time they must be taken to be tenants in common, at what time is it suggested they ceased to be tenants in common, and became joint tenants? If one arrives at the conclusion that they have become joint tenants, I take it, it must be that the evidence shews that there has been an agreement on their part—not necessarily an express or formal agreement, but an agreement at some time or other on their part to change their rights from those of tenants in common to those of joint tenants. Now there is no suggestion in these accounts, from beginning to end of there being any change at all in the method of keeping them, or any change in the constitution of the family, of the estate between the two brothers. They lived jointly and they lived together, carried on their worship together. They messed together, and so forth. They have lived as one would expect. There is no difference in the way of living between them, whether they were tenants in common, or joint tenants; accordingly as I take it and I am quite prepared to admit their mode of life is the same as that of two

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Raja joint tenants would be, and the accounts are the same, but I say
 Chelikani the accounts would be the same and therefore no inference is to
 Venkayamma be drawn from the accounts one way or the other. Certainly no
 Raja inference can be drawn that what began as a tenancy in common
 Chelikani has by agreement of the parties changed into a joint tenancy.
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Further than that there are certain modes of dealing with the property which are not in any way conclusive one way or the other ; but there are certain ways in which the property has been dealt with, which, so far as they go, point more to their considering themselves tenants in common than as being an undivided Hindu family managed by a manager. It was referred to by my learned friend in various documents the way in which Niladri was described as the elder brother and guardian of Appa Rao. I do not mean to say for a moment that that could not take place if they were joint ; it might of course. They are very loose indeed in all their phrases. You can draw very little inference from the wording of a document. If the elder brother was the manager, and the other a minor, of a Hindu joint family, very often and possibly, generally, he would rather be described as the managing member of a family consisting of himself and his undivided brother, so and so. That is a common way of dealing with it. We never find that. We find him always described as the elder brother and guardian of Appa Rao. At any rate that is the way he would be described in the case of tenancy in common.

Lord Macnaghten :—Why does it savour rather of tenancy in common than joint tenancy ?

Jardine :—For this reason that in a tenancy in common they each would have an individual interest, and they would each have to contract. To have a binding contract you would have to contract with each of them for his individual interest. If it were joint family the managing member would have power to bind all the other members of the family by contracting in his own name as manager of the family. It is not necessary to have them all represented. He represents the family ; but the elder brother would not represent the younger brother if they were tenants in common, with individual and particular interests. That is why it savours of the two. You might have another mode of expression in the case of its being the managing member of a joint family—you

might have it, but you do not. You have what is at best ambiguous and as far as it has any weight, points rather to tenancy in common than to joint tenancy.

Lord Lindley :—With regard to guardianship proper while the father is alive it is curious he is described as manager and guardian during the minority.

Jardine :—Yes ; he does appear in all these documents to act for him although according to the evidence the father did continue to manage for some time after the elder brother attained majority. The natural guardian of the son would have been the father.

Lord Lindley :—Does the description of the elder brother as guardian while the father was alive point to a joint tenancy or *vice versa*.

Jardine :—I do not think it has any bearing. The father was alive until after the death of Niladri. Well then, just the same remark applies to the entering in the accounts in the names of the two brothers. In case of there being a joint family holding it as a joint estate, it would have been sufficient to put the eldest brother's name. So that as I submit the argument on that really is that they inherit this as tenants in common. There is nothing in the evidence which has been pointed out to shew any intention at any time on their part to alter the nature of the estate which they took originally and if that were so that estate would remain whatever it was. If they took originally as a tenancy in common it would be a tenancy in common at the death of Niladri. * * * *

If there had been an understanding that there was originally a tenancy in common which became a joint tenancy with right of survivorship, and if Appa Rao thought himself entitled by survivorship to the whole estate, he would not have acquiesced in a will which purported to give a moiety of the estate to the widow. If this were a joint estate, Niladri had no power. * * *

[*Adjourned for a short time.*]

Jardine :—My Lords, there was a case I intended to cite at an earlier portion of the argument, and I will give your Lordships the reference to it now. It is in Indian Law Reports 25 Madras, page 149.

Lord Macnaghten :—What is this about ?

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Jardine :—About the joint family in the Mitakshara, and the possibility of creating a joint family by agreement. At the bottom of page 153 I will read a portion of the judgment of Mr. Justice *Bhashyam Aiyangar*—" Bearing these facts in mind I will now proceed to consider the principles of Hindu Law which, in my opinion, bear upon the determination of the question whether plaintiff and first defendant can be regarded as owning the property in question as members of the joint family," &c., &c. [Reading a passage from the judgment to the words, page 155] " or it may be the self-acquisition of one or more individual members of that branch which by act of parties has been impressed with the character of joint property owned by that branch, and that branch alone to the exclusion of the other branches." My Lords, I intended to have cited that case earlier.

Phillips :—My Lords, I will not detain your Lordships very long, but I should like to make a few remarks on this question of the obstructed inheritance. I submit first of all that the incident of survivorship depends entirely upon the absence of individual interests in the property in the members of the joint family. It will hardly be disputed that if there are more daughters than one, and the property descends to the daughters' sons it will descend to all the sons of the daughters after the daughters' death *per capita* and not as representing each daughter—as individual units and not as corporate units. That does not seem really to be in dispute, and, therefore, if that is the case, and if the first proposition that I submit is correct that the incident of survivorship depends upon the absence of individual interests, it follows that survivorship does not attach to this inheritance which comes to the daughter's sons. But then, as I understand my learned friend, Mr. Mayne suggested that coming to a joint family it impresses the property with the character of joint property, and turns it in fact into an unobstructed inheritance again—unobstructed property which will descend as I understand thenceforth with the incident of survivorship which renders it indistinguishable from an unobstructed property. There may be several daughters and several sets of sons, some of them constituting joint families, and others not constituting joint families, and then the question that arises is does the property which descends to the daughter's son adapt itself and assimilate itself to the conditions of the respective families to

which it comes. I submit there is no warrant for such an assumption as that or for such an inference. There may be a single son of course, but there would be no question of altering the character of the incidents of the property when it came to that individual. There may be another family divided: there may be two or more members of it who are divided, and there may be a joint family. I am not speaking of what they may consciously and deliberately do with it when they get it, but the question is whether its coming to them holding property of these various descriptions makes any difference to the property which comes to them. I submit it cannot do so; (I submit) that the property that comes to them is impressed with a certain course of inheritance, and in fact it may revert again to the family from which it came. It may revert again to the family of the maternal ancestor—the maternal grandfather. On the failure of the lives of daughters that descent would, I apprehend, have to be traced again from the original ancestor.

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Mayne :—No, that has been decided against. It has been decided by this Tribunal that daughter's sons are a new foundation of descent. It never goes back to the original ancestor. That is 23 Indian Appeals, page 128.

Phillips :—I am supposing that stock to be exhausted—the daughter's stock. Then what becomes of it?

Mayne :—Because she had no sons.

Lord Macnaghten :—Perhaps you will wait till it comes to your reply.

Phillips :—I am supposing that these descendants had failed. Then it would have to be traced again from the original ancestor, and the question is really a question of assimilating these two kinds of property, one of which comes through a female, and which ordinarily follows a different course of descent than that which comes through a male to assimilate the property coming through a female to a like property that comes from the paternal ancestor, namely, the unobstructed property. I submit that it would be against the principles of Hindu Law to assimilate these two courses of inheritance merely by the fact of their coming to the same set of persons. In fact I would go further and suggest whether it would be possible for the heirs through a female to impress those two bits

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of property with the same course of descent so as in all cases they would go together. That I think, my Lords, is all I wish to address to your Lordships.

Mayne :—*****Then as to the two other points upon which I argued at very great length I intend, not to take up very much of your Lordships' time about them. The proposition that I laid before your Lordships was that the arguments of the Court below must be resolved into this syllogism all joint property with survivorship must have come to the holder as unobstructed inheritance. This is not unobstructed inheritance; therefore it cannot be giving property with survivorship, and of course the whole force of the argument depends upon the truth of the major proposition, and I have given instance after instance to show that the major proposition is not true and two of those instances apply to an exactly similar joint ownership in the two female successions that precede the daughter's son, and I have been unable to see why there should be a distinction made and it should be said that widows are capable of taking an obstructed inheritance as joint owners with survivorship, that daughters are capable of taking a similar estate in a similar way, but that the daughter's sons are incapable of taking it. The only argument that I can see that is suggested is that there would be a considerable difficulty in the way of applying the joint estate with survivorship to the case of the sons of different heirs who are all members of the different families. There would be that difficulty, and I admitted that if they all took the estate as joint tenants with survivorship *inter se* it would not be by the operation of Hindu Law laying down the devolution of a joint family property in regard to members of a joint family in regard to that which became a joint family property, because of course the law of succession in a Hindu family only applies to a Hindu family, but I say that that is no objection to letting the ordinary law apply in regard to those who do take as members of a joint family—who are capable of holding property as a joint family. My learned friend Mr. Jardine seems to suggest that the law of joint family property and of survivorship originated from the Mitakshara and that in the Mitakshara it was bound up with the principle of the son's interest by birth in the father's property in such a way as to make the one inseparable from the other and to make out that no person could have joint

property unless he was a son who had got by birth an interest in his father's property. But my learned friend forgets that the joint family was a thing which existed possibly thousands and certainly hundreds and hundreds of years before the Mitakshara, and that from the very earliest days in which there is any allusion to Hindu property the notion of joint property is inseparable from the basis of it. In Hindu law joint ownership is the rule, separate ownership is the exception. A joint family is the rule, a separate family is the exception. The words of the Mitakshara in these sections which my learned friend read were not referring to the general principle of joint property or the joint family, but they were referring to the discussions that had arisen and were bound to arise anticipating the Dayabhaga as to what the rights of a son were to obtain partition of the family property, and it was in view of those that he raises these discussions and points out that he cannot have a partition of his father's property unless he had got an interest in it by birth, because there is nothing in the Mitakshara to shew he considered that no one could be the owner of joint property except sons who had succeeded to their father's property in the way of obstructed property. There can be nothing to shew anything of the sort. Even he thought that under the Mitakshara law it would be very difficult to explain to any one the distinction between a tenancy in common, and a joint tenancy. My learned friend said it is quite simple because you see it is in the Dayabhaga, but the Dayabhaga is not the Mitakshara. The Dayabhaga is a heretical publication which within the limits of Bengal and Behar completely alters the whole structure and the whole principle of the Mitakshara law and even the Dayabhaga does not say the tenancies are not joint tenancies, but what it does say is that each son takes as heir and not as a person who has an interest during his father's life, and it is by virtue of that process that it works out the tenancy in common. It does not mean the peculiar descent of the son and his disadvantages arising from the nature of the tenancy, but it works out the nature of the tenancy because it has deprived the son of any interest in his father's property during the lifetime, and even then the result is that the two things are so mixed up that as my learned friend very properly remarked it is very difficult to know when a Bengal family ceased to be a joint property and when it began to be a tenancy in common. It really never seems

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to be anything but an absolute Mitakshara joint family until the time there is a death, but, however, we are not dealing with the Dayabhaga, we are dealing with the Mitakshara which knows nothing about any such tenancies and as I submit my learned friend has not pointed out any reason why this principle of tenancy in common should be introduced for the first time as regards this particular unity of succession.

Then I will not go again over anything he said as regards the question of fact. My learned friend seems to assume, as the High Court assumed, that these people came into possession of the estate with a full knowledge that they had a particular tenure of it which is completely unlike any tenure that any one has who being a member of a joint family gets property which devolves upon that joint family from any source as a joint family or on a person from time to time representing that joint family. It seems to me that the real answer and explanation of the whole thing is that they being joint members received this property, and it never occurred to them to receive it in any other sense or in any other way and that they dealt with it all along knowingly and consciously as joint property and supposed it to be so, intending it to be so, and acting upon it as if it was so, and if so I say that is all sufficient. There is no fraud upon any one; there is no mistake of fact on the part of any one and that therefore on both grounds, first of all that this was not a tenancy in common but a joint tenancy, and secondly, that if it had been conceivably a tenancy in common no one knew it, or acted upon it, or intended to deal with it under those forms. I submit that under the cases I have cited that is amply sufficient.

Their Lordships took time to consider the case and their Lordships' judgment was delivered by

Lord Lindley :—A Hindu gentleman named Venkat Rao, living in the Province of Madras, where the Mitakshara Law prevails, died in 1869, leaving one widow, who died in July 1875, and one daughter who died in 1884. He left no other widow, and no descendant except his daughter and her issue. His daughter married and left two sons, viz., Niladri and Appa Rao. Niladri was born in his grandfather's lifetime and died in 1892; Appa Rao was born after his grandfather's death and died in 1901.

Venkat Rao's property was his own separate property. The litigation which has culminated in these appeals is between persons claiming under these two persons, grandsons of Venkat Rao; and the main questions raised on the Appeals and which their Lordships have to determine are as follows, viz:—(1) Did Venkat Rao leave a will, or did he die intestate? (2) If he died intestate, did his property descend on the death of his daughter to her two sons jointly with benefit of survivorship, or jointly or in common without benefit of survivorship? In the latter case Niladri's share would on his death devolve on his widow and children.

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There was a subordinate question relating to a supposed will of Niladri in favour of his widow; but this will was found to be a forgery by two Courts in Madras, and it has not been seriously contended before their Lordships that this alleged will can be now relied upon. No further allusion will therefore be made to it.

As regards the first question, it is clearly proved that Venkat Rao made a will disposing of his property in favour of his wife for her life, and after her death in favour of his daughter for her life, and after her death in favour of his grandson by her, i. e., Niladri. This will was made in 1866, when Venkat Rao was ill; it was put into an envelope, and was deposited and registered in the office of the District Registrar where it remained until he died. Venkat Rao, however, recovered from his illness, and in 1867 he executed a power of attorney appointing a vakil to obtain the will out of the Registry and to restore it to him. Owing to some blunder this was not done. Venkat Rao's intention to get his will back into his own possession and not to leave it as it was, cannot be doubted. There is some evidence to show that he believed he had destroyed it. He certainly cancelled some grants of land recited in it. Persons existed whose interest it was to claim under it but no one ever did so although it is difficult to believe that none of them knew of it. For nearly thirty years no one ever thought of asserting any claim under it. The revocation of this will does not depend upon any English Ordinance or Code; and actual destruction or a formal revocation in writing are not essential to constitute revocation. See *Pertab Narain Singh v. Subhao Kooer*¹. The District Judge who saw the witnesses came to the conclusion that the will was revoked and his decision has been affirmed by the High Court.

¹ L. R. 4 I. A. 228, at p. 245.

After carefully considering the evidence, their Lordships are not prepared to advise His Majesty that their decision on this point ought to be reversed. The will must, therefore, be treated as revoked.

The next question which arises is whether the two grandsons took jointly with benefit of survivorship, or whether each took an undivided share, which, on his death, devolved upon his representatives or assigns. Upon this question the Courts below have differed. The District Judge held that they were joint owners with benefit of survivorship. He did not decide that they acquired the property as joint owners, but he held that they had so dealt with it as to show that it was joint property. The High Court held that they succeeded as owners in common without benefit of survivorship and that they never ceased so to hold it. The High Court followed a previous decision of the High Court of Calcutta in *Jasoda Koer v. Sheo Pershad Singh*,¹ the correctness of which was strenuously denied by Mr. Mayne, and must be considered.

The law of inheritance in the case of women is left in great obscurity by the Mitakshara. The subject is dealt with in Chapter 2, section 11, and has more than once been considered by this Board. The nature of a widow's estate was settled in two cases in *Mussumat Thakoor Dephee v. Rai Baluk Ram*² and *Bhugwandeon Doobey v. Myna Bae*³ and the nature of a daughter's estate was considered in *Chotnu Lal v. Chunno Lal*.⁴ It was there decided that under the law of the Mitakshara a daughter's estate inherited from the father is a limited and restricted estate only, and not stridhun. Upon her death the next heirs of her father succeed thereto. In *Muttu Vaduganadha Tevar v. Dora Singha Tevar*,⁵ the same principle was applied to cases in Madras governed by the Mitakshara Law. Their Lordships, therefore, consider it conclusively established that in this case Niladri and Appa Rao on their mother's death succeeded as heirs to their grandfather's estate.

What then was the character of the property which they took. In the grandfather's hands it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance. Niladri and Appa Rao were members of a united family.

1. I. L. R., 17 C. 33.

2. 11 M. L. A., 139.

3. 11 M. L. A. 487.

4. I. B., 6 I. A. 15.

5. I. L. R., 3 M. 290.

"According to the principles of Hindu Law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship, that in which they had, during the deceased's lifetime, a common interest and a common possession." (*Katama Natchiar v. The Rajah of Shivaganga*¹). It is true that on acceding to their grandfather's property, Niladri and Appa Rao might have partitioned it, but they did not do so. It is the right to partition which determines the right to take by survivorship; and where there is no partition the survivor takes.

The High Court have proceeded on the principle that although persons who succeed to joint family property take jointly if their inheritance is unobstructed, yet that in cases of obstructed inheritances those who succeed take as tenants in common, and not as joint tenants. But the authorities referred to by Mr. Mayne in his very able argument show that this last proposition is by no means universally true. Members of a joint family who succeed to self-acquired property take it jointly (*Rajah Ram Narain Singh v. Pertum Singh*² and see *Rampershad Tewarry v. Sheochurn Doss*³). But it may be that where sons succeed, the inheritance to them is unobstructed. Widows succeed jointly; (*The Tanjore Case*⁴, *Bhugwandeem Doobey v. Myna Base*⁵ and *Sri Gajapathi Nilamani Patta, etc., v. Sri Gajapathi Radhamani Patta, etc.*⁶) so do daughters (*Amirtolall Bose v. Rajoneskant Mitter*⁷ and see *Srimuttu Vizia Raginadha; etc. v. Dorasinga Tevar*⁸).

In *Jasoda Koer v. Sheo Pershad Singh*⁹ the High Court of Calcutta certainly decided that the sons of a daughter (she being the only child) succeeded to their grand-father's property in undivided moities and not jointly with benefit of survivorship. This decision was in 1889; it was followed in 1895. by the High Court of Madras in *Saminadha Pillai v. Thangathanni*¹⁰. The decision of the High Court now under appeal is based upon those authorities. The Calcutta decision appears to their Lordships to have

1. 9 M I A 617.

2. 20 W. R. 189

3. 10 M J. A 490

4. 3 M. H. C. R 424

5. 11 M I. A. 487, see page 514.

6. L. R. 4 I. A. 212, see p 221

7. L. R. 2 I. A. 113, see p. 126.

8. 8 G. M. H. C. R., 310

9. I L R., 17 C. 33

10. I L R., 19 M. 70.

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been based upon a view of Mitakshara Law, which further investigation shows to be erroneous; viz., upon the view that according to the Mitakshara Law, the doctrine of survivorship is limited to unobstructed successions and to the succession to the joint property of re-united co-parceners. No authority for such a limitation can be found anterior to the Calcutta case. The only previous decision directly in point is *Gopulasami v. Chinmasami*¹ where the two sons of a daughter were held to be jointly entitled to their grandfather's property, but the decision was based on the way they had dealt with the property rather than on the title they acquired on succession. The head-note is rather misleading on this point. The authorities to which their Lordships have referred and others cited by Mr. Mayne, and which their Lordships have examined, although not directly in point, are clearly opposed to the general doctrine laid down in the Calcutta case.

It does not follow that because the reasons given for a decision are unsatisfactory, the decision itself is erroneous. But in this case the decision in question appears to their Lordships to be opposed to the principles which regulate the devolution of joint family property to which the Mitakshara law is applicable, and they, therefore, cannot adopt the decision in *Jasoda Koer v. Sheo Pershad Singh*². They think it erroneous. The decision in *Saminadha Pillai v. Thanguthanni*³ and the decision, appealed from are both based upon it and are open to the same objections.

In the result their Lordships agree with the District Judge. He, however, considered that the conduct of the parties, and the mode in which the grandsons dealt with, and enjoyed, the property were sufficient to decide the case. But their Lordships do not think that the evidence so unmistakeably negatives ownership in common as distinguished from joint ownership as to render it safe to decide the case on this ground alone. There is certainly nothing in the evidence which supports the view that the grandsons held the property in common rather than jointly; there is no separate dealing with any share. It is not suggested that if they succeeded jointly they ever ceased to hold it in the same way. The property was treated and dealt with as a whole, and so far joint ownership rather than ownership in common is the more probable. After their mother's death, and whilst their father was living, Niladri managed the whole property, and acted as his brother's guardian during his minority, which would hardly have

1. I. L. R., 7 M. 458.
2. I. L. R., 17 C. 33.

3. I. L. R., 19 M. 72.

been the case if the brothers had their separate interests in undivided shares. But there is nothing so clearly decisive either way, as to render it unnecessary in their Lordships' opinion to decide the nature of the ownership which was acquired by the grandsons when they succeeded to the property.* It is, however, satisfactory to find that the decision arrived at is in complete accordance with the mode in which the property has been dealt with by the family as long as Niladri was alive.

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Their Lordships will, therefore, humbly advise His Majesty to dismiss the plaintiff's cross appeal (57 of 1900) setting up the will of Venkat Rao and to allow the defendant's appeal (1 of 1900) and to dismiss the plaintiff's appeal to the High Court with costs and to reverse the decree of the High Court so far as it is inconsistent with the decree of the District Judge and to restore that decree and to remit the suit (No. 8 of 1893) whence these appeals arise to the High Court, for the purpose of executing or causing to be executed the decree of the District Judge and the order made on these appeals.

It remains only to deal with the costs of the appeals. These must be paid by the plaintiff who has failed. But their Lordships cannot refrain from expressing their strong disapprobation of the expense which has been unnecessarily incurred in this case. A joint appendix of moderate dimensions would have been ample for all the purposes of these appeals. The appellant's legal advisers in India appear to have endeavoured, but unsuccessfully, to reduce the bulk of matter to be printed. But instead of an appendix containing no more than was necessary, several volumes of over 1000 pages each have been translated and printed at vast expense, setting out accounts running over many years, which it was wholly unnecessary to print and which no one has referred to. Their Lordships regard such reckless extravagance as an abuse of the rights of suitors, whether appellants or respondents. The parties

After the decision of the Judicial Committee in this case the *dictum* of *Bhaskyam Iyengar, J.* in *Sudarsanam Maistri v. Narasimhulu Maistri*, I.L.R. 25 M. 149 to the effect "that so long as a family remains an undivided unit, two or more members thereof—whether they be members of different branches or of one and the same branch of the family,—can have no legal existence as a separate independent unit" may probably not be regarded as sound law. It will appear from the facts of the Privy Council case that there were a grandfather, his son, the father, and the latter's two sons who formed an undivided family and notwithstanding the decision in *Sudarsanam Maistri's* case I.L.R. 25 M. 149 which was cited to their Lordships, the Privy Council held that the grandsons took as coparceners the estate which they had inherited from the maternal grandfather.—*Ed.*

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to blame are in India, and their Lordships have no power to ascertain who they are, nor to make them responsible for the abuse. Their Lordships will do what they can. They will call the attention of the High Court of Madras to the case and suggest to them the propriety of exercising their jurisdiction over those who conduct litigation and prepare appeals from their decisions and of taking such steps as may be practicable to compel those who are to blame in this instance to pay the costs unnecessarily incurred. If nothing can be done under existing regulations, rules should be made to check such gross abuse. Their Lordships will direct the Registrar in taxing the costs to take no account of any of the volumes except the two which were bound and used at the hearing and not to allow more in respect of them than he thinks fair and reasonable.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Moore.

Sreepada Brahmayya Pantulu ... Appellant* (*Defendant*).

Parasuramayya ... Respondent (*Plaintiff*).

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Limitation Act, Art. 179—Civil Procedure Code, S. 232—Application in accordance with law.

A person who becomes entitled under a decree to realize the amount due under another decree, is a transferee under S. 232, C. P. C., and is the only person who could have applied for execution of the latter decree. Such application is one in accordance with law though the transferee is subsequently held to have no title and the application has the legal effect of saving the bar and enures in favor of all persons entitled to execute the decree.

Appeal from the order of the District Court of Ganjam, in Appeal No. 194 of 1900, reversing the order of the Court of the District Munsif of Berhampore on M. P. No. 1599 of 1900 (E. P. No. 568 of 1900).

One Parasuramiah, the respondent herein, brought a suit O. S. 376 of 1895 for money (due upon a pronote) against one Brahmayya Pantulu, the appellant herein, on the file of the District Munsif's Court of Berhampore and obtained a decree on 19th November (March) 1896. The defendant, Brahmayya, appealed to the District Court in A. S. 144 of 1896, but this appeal was dismissed with costs on 23rd June 1897.

A third man, Duvvada Janakiramiah claiming to be a coparcener by adoption with Parasuramiah brought a suit for partition against the latter and others, in the District Court, Ganjam,

and obtained a decree on 28th February 1896. The decree was appealed against to the High Court in A. S. No. 166 of 1896 and A. S. 25 of 1897 and the decree of the District Judge was reversed and plaintiff's suit dismissed with costs on 2nd August 1898. While the case was pending in appeal in the High Court, the decree of the District Court was executed by Janakiramiah and the decree in C. S. No. 376 of 1895 fell to the share of D. Janakiramiah. The latter applied for execution on 20th April 1898 of the decree in O. S. No. 376 of 1895 and A. S. No. 144 of 1896.

After the partition decree was reversed, the decree-holder, the plaintiff in O. S. No. 376 of 1895, applied for execution on 23rd July 1900. The judgment-debtor contended that it was barred and that the plaintiff could not rely upon the application of 20th April 98 as it was made by a person who was found to have no title. The District Munsif dismissed the execution application, but, on appeal, the District Judge reversed it and allowed execution. Hence this second appeal.

T. V. Seshagiri Aiyar for *V. Krishnasami Aiyar* and *V. Ramesam* for appellant.

A. S. Balasubramanya Aiyar for *P. R. Sundara Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The application of 20th April 1898 was made under S. 232, Civil Procedure Code, in accordance with law and was made to the proper court. The applicant was the only person who could have applied for execution at that time, and the fact that the decree was afterwards reversed could not affect the legality of his application, or whatever legal effect it had in saving the bar by limitation.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Trilochana Bakshi	...	...	Appellant* (<i>Defendant</i>).	Trilochana Bakshi
Brojo Patro	...	...	Respondent (<i>Plaintiff</i>).	Brojo Patro.

Malicious Prosecution—Information to Police—Police investigation—Police Search—Small Cause Nature—Civil Procedure Code, S. 586.

A suit for damages for trespass in that the defendants wrongfully caused the plaintiff's house to be searched by the Police is a suit of small cause nature; and no second appeal lies under S. 586, C. P. C.

Trilochana
Bakshi
v.
Brojo Patro.

Where the information was given by the defendants to the Police and the latter made a search in the course of their investigation preparatory to a prosecution before a Magistrate, no action for malicious prosecution is sustainable against the defendant though he may be guilty of trespass.

Second appeal from the decree of the District Court of Ganjam at Berhampore in A. S. No. 4 of 1900 presented against the decree of the Court of the District Munsif of Aska in O. S. No. 39 of 1899.

The defendant alleged that there was a theft of his box with its contents. Some days after the occurrence the defendant alleged that he got a clue of the theft and of the persons involved in it and gave a statement to the Police implicating plaintiff, among others. The police searched the plaintiff's house, but nothing was found.

The plaintiff now sued the defendant for damages, alleging that the defendant's conduct was malicious and without reasonable and probable cause and that defendant maliciously moved the police and got the search made and that the search caused loss of character and put him to mental anxiety. Both the lower courts gave plaintiff a decree. Hence this second appeal.

C. V. Ananthakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

C. V. Krishnaswami Aiyar for *V. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The facts in our opinion show that the plaintiff's legal cause of action was for trespass in the defendant's having wrongfully caused the plaintiff's house to be searched. The facts would not support an action for a malicious prosecution, inasmuch as the information given was only to the police, and the steps taken were only in a police investigation preparatory to a prosecution before a Magistrate. So regarding the suit as one for damages for trespass, it is not exempted from the cognizance of a Court of Small Causes, and as the damages claimed do not exceed Rs. 500, no second appeal lies under section 586 of the Code of Civil Procedure. This appeal is, therefore, rejected with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Sugappa, minor, by his next friend and
guardian Chengalappa Appellant *
v. (Plaintiff).
Govindappa and others Respondents.
(Defendants).

Stamp Act Ss. 35 and 36—Civil Procedure Code Ss. 140 and 142—Insufficiently stamped document marked as exhibit—Promissory note not payable to order—Non-negotiable Promissory note—Assignment by separate deed—Acknowledgment. Sugappa v. Govindappa.

Where a document purporting to be a promissory note is alleged to be insufficiently stamped but is marked as an exhibit under S. 140, C. P. C. and is not rejected under S. 142, C. P. C., no objection could be taken having regard to S. 36 of the Stamp Act that it is not admissible in evidence on the ground that no penalty can be levied under S. 35 of the latter Act.

An extension of time granted by the creditor upon the written application of the debtor will amount to an acknowledgment and will operate to save the bar of limitation.

A promissory note which is not negotiable may be assigned by a separate deed without any endorsement and the assignee will be entitled to sue upon such promissory note.

Where the defendants executed a document to the president of a fund promising to pay the amount borrowed to the latter on demand three months after date and on default to pay jointly or severally interest according to the rules of the fund, but there was no provision that they would pay to the order of the president.—

Held that the document was a promissory note which was, however, not negotiable.

Appeal from the decree of the District Court of Bellary in O. S. No. 2 of 1899.

The facts of the case are the following:—

Govindappa, Chudi Basappa, 1st and 2nd defendants and Siva Santappa, the elder brother of 3rd defendant, executed a certain document alleged to be a pronote in favour of the Bellary Merchants' Mutual Benefit Fund (Limited) on 23rd November 1892. Several extensions for payment were obtained on written applications by the executants, the last of them being on 7th September 1895 when time was granted till 23rd December 1895. The debtors did not pay and the Fund transferred its rights under the document to the plaintiff who now brought this suit on 26th December 1898 for the balance due under the documents.

The document was stamped with two stamps of 12 annas each (Rs. 1-8-0.) There was no endorsement by the stamp-vendor that

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v.
Govindappa.

a single stamp was not available. The District Judge held that the document ought to be stamped with a stamp of Rs. 3-0-0 and that as it was insufficiently stamped, the document being a pronote, no penalty could be levied and that, therefore, it could not be admitted in evidence and acted upon. (The document was, however, marked as Exhibit C.) He also held that the transfer was invalid as the pronote being negotiable could only be transferred by endorsement and delivery. He dismissed the suit but without costs, as the plaintiff had a case on the merits and the defendant's defence was disingenuous and dishonest.

The following is the translated portion of Exhibit C, the document sued on :—

Kakubalu Govindappa, residing at Hospet, in Hospet Taluk, Bellary District, 2. Chudi Basappa, residing in the said place, and 3. Siva Santappa, residing at Bellary—we three will pay to the President of Bellary Merchant Mutual Benefit Fund (Limited) Rs. 4,000 in words rupees four thousand, borrowed from you on the 23rd November 1892, three months hence. If we fail to pay accordingly, we jointly or any one of us will pay with interest according to rule 79 of the Fund rules.

(Signed) Kakubalu Govindappa.

(„) Chudi Basappa.

(„) Siva Santappa.

The following is the translation of Exhibit E7, the written application for extension mentioned by their Lordships in the judgment.
To

The Secretary to the Merchants'

Mutual Benefit Fund (Ld.)

Brucepet, Bellary.

Sir,

Application put in by Kakubalu Govindappa of Hospet is as follows :—

“You have given me notice that of the two sureties that I have already furnished for the loan of Rs. 2,800-0-0 taken by me from your Fund, Siva Santappa died and that I should give a fresh surety. I request that Sivakati Basappa, undivided brother of the said Siva Santappa, may be taken as surety ; that, as he and Chudi Basappa, who has till now stood surety, may be accepted as sureties, that a fresh document may be got executed and that the due

date [of payment] of the temporary loan may be extended. Sugappa,
 Moreover, I have put in a renewal application with the signature ^{v.} Govindappa.
 therein of the present surety, requesting the grant of extension of
 time till this petition is disposed of and the result communicated
 to me. In token of the willingness of Sivakati Basappa to stand
 surety, I have obtained his signature herein. I pray, therefore,
 that orders may be passed as requested by me.

Your obedient servant,

22—9—95.

(Signed) Kakubalu Govindappa.

As stated above I consent to stand surety in the room of my
 elder brother.

(Signed) Sivakati Basappa.

P. S. Sivaswami Aiyar for appellant.

C. Ramachandra Row Sahib for respondent.

The Court delivered the following

JUDGMENT:—As it is clear that the Judge in fact admitted
 in evidence Exhibit C, the objection made under section 35 of the
 Stamp Act is of no avail. Section 36 is clear as to this. It is
 argued that the Judge intended to reject the document as is shown
 by paragraph 15 of his judgment; but even if such were his inten-
 tion when we find that he has admitted it and made the endorse-
 ment required by S. 140 of the Civil Procedure Code and
 written no endorsement of rejection as required by S. 142 of
 the Civil Procedure Code, it is impossible to admit this argument.
 There is no bar by limitation. We are satisfied upon the evidence
 that the printed portion of Exhibit E7 was signed by all the de-
 fendants, and that document shows that before the debt became
 barred an extension of time was granted up to the 23rd December
 1895 inclusive. The Court was closed on the 23rd December 1898,
 and the plaint was presented on the 26th December, the 1st subse-
 quent day on which the Court was open. It was, therefore, in time.
 The Judge is clearly mistaken in holding that this was a negotiable
 promissory note and in holding that an assignment by separate
 deed was invalid.

We must reverse the decree of the District Judge and give the
 plaintiff a joint decree against the three defendants for Rs. 2,547-2-4
 up to date of plaint, plus six per cent. on the principal from date of
 plaint till this date and upon the aggregate amount including costs
 in the lower Court and this Court from this date to date of payment.

*In re petition
of Krishnama
Chariar.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Benson and Mr. Justice Moore.

Krishnamachariar

Petitioner.

High Court circular—Private Vakil.

Where a High Court circular stated as a general rule that no person, not qualified as legal practitioner should be permitted to act in any proceeding except to prevent a miscarriage of justice, a general order by a magistrate that no private Vakil shall appear in his court goes beyond the terms of the circular. But he will be acting in consonance with its terms if he states that he is not prepared to make any general exception in favor of any particular individual.

Application praying that, in the circumstances stated therein, the High Court will be pleased to revise the proceedings of the District Magistrate of Tinnevely in District No. 41 (Magisterial), dated 17th January. 1901.

The petitioner appeared in person.

The Court made the following

ORDER:—We think the circular of the District Magistrate, dated January 17, 1901, went beyond the terms of the High Court circular, dated October 18, 1899. The High Court circular states that, as a general rule, no person who is not a qualified legal practitioner should be permitted to act in any proceeding except to prevent a possible miscarriage of justice.

The circular of the District Magistrate contains this passage: "Magistrates will do well not to allow uncertificated men to appear except in cases in which they are personally interested."

The order made by the Sub-Magistrate of Virudupatti, which is a general order that no private vakil shall appear in his court, and which was made in pursuance of the District Magistrate's circular of January 17th, also goes beyond the terms of the High Court circular.

As regards the order of the District Magistrate, dated 4th May 1901, no exception can be taken to so much of the order as states that the District Magistrate is not prepared to make any general exception in favor of any particular individual.

The District Magistrate will be requested to modify his circular of January 17, 1901, so as to bring it into accordance with the High Court circular of October 18, 1899.

We do not think the last paragraph of the High Court circular precludes a Magistrate, in an exceptional case, from exercising his discretion by allowing a private vakil of good character to appear in a case. With these remarks we refer the petition to the District Magistrate for disposal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Boddam.

Narayanasami Gurukkal ... *Petitioner * in C. M.*
P. Nos. 603 and 604.

Vellasamy Tever and another ... *Petitioners in C. M.*
P. Nos. 605 and 606.

Rajah Rajeswara Dorai ... *Petitioner in C. M.*
P. Nos. 637 & 638.

v.

Irulappa Nadan and 13 others ... *Counter-petitioners*
(Appellants in Appeals
Nos. 11 and 77 of 1900).

Civil Procedure Code, S. 437—Trustee and Cestui que trust—Compromise by trustee in appeal—Right of beneficiaries to intervene. Narayana-
sami
Gurukkal, et al

Where a trustee is wholly uninterested in a contest relating to the trust or is adverse to the interest of the beneficiaries, the latter will be allowed to intervene and contest the claim. v.
Irulappa.

*Olagg v. Rowland*¹ and *Payne v. Parker*,² referred to.

Where parties are allowed to intervene in an appeal, they should be joined as parties to the suit and not to the appeal.

Where, therefore, the Raja of Ramnad, the hereditary trustee of the Kamuthi temple, sued for a declaration that the Shanar defendants were not entitled to enter such temple and obtained a decree in the first court and pending an appeal by the Shanars, made a compromise under which he virtually gave up all the rights under the decree, and the petitioners, the beneficiaries interested in the temple, applied to be made parties for opposing the compromise and resisting the appeal :—

Held, that they were proper parties to intervene and it was not necessary for them to show that the trustee collusively entered into the compromise.

Petitions praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to add the petitioners as parties, respondents, in Appeals Nos. 11 and 77 of 1900 presented to this court against the decree of the Subordinate Judge's Court of Madura (East) in Original Suit No. 33 of 1898.

* C. M. P. 603 to 606, 637, 638, of 1901.

18th September 1902.

1. L. R. 3 Eq 373,

2. 1 Ch. App. 324.

Narayana-
sami
Gurukkal, et al 603 to 606. *T. Ranga Ramanujachariar* for petitioners in C. M. P. Nos.

v.
Irulappa. *T. Rama Row* and *V. C. Desikachariar* for petitioner in C. M. P. Nos. 637 and 638 of 1901.

Joseph Satya Nadar, V. Krishnasami Aiyar and *P. R. Sundara Aiyar* for appellants in Appeals Nos. 11 and 77 of 1900.

P. S. Sivaswami Aiyar for respondent in the said appeals.

The Court made the following:

ORDER :—In these petitions three persons seek to be joined as respondents in Appeal Suits Nos. 11 and 77 of 1900 pending in this court. Both appeals are identical, but were filed in two courts owing to a doubt as to jurisdiction. The respondent, who was plaintiff in the suit, does not oppose the petitions, but appellants who were defendants in the suit, object on two grounds, *viz.*, (1) that there is no ground shown in the petitioner's affidavits for joining them, and (2) that they ought not to be joined as respondents in the appeals, but if at all, as plaintiffs in the suit.

The plaintiff, as Zemindar of Ramnad, is the hereditary trustee of the Minakshi Sundareswaraswami temple and as such trustee he brought the suit (O. S. No. 33 of 1898) for a declaration that neither the defendants nor other Shanars were entitled to enter the temple and for an injunction restraining them from so doing, and he obtained a decree to that effect after a protracted trial. The Shanars filed the appeals now pending, and the plaintiff and defendants put in a petition (C. M. P. No. 705 of 1901) stating that they had compromised the suit and requesting that the compromise might be recorded, and a decree passed in accordance with it, in supersession of the decree originally passed in the suit. The plaintiff now wishes to withdraw from the compromise, and, we are informed, intends to oppose it.

- In support of the present petitions affidavits have been put in alleging, *inter alia*, that the plaintiff has been influenced by corrupt motives and by false representations, to enter into a compromise.

With regard to these allegations, we may say at once they are made in such terms as to be quite worthless. The

charge of corruption is made in paragraphs 10 and 13 of the affidavit of Narayanasamy Gurukkal, in which he says, "I am given to understand, etc.," and "I am credibly informed and believe," etc., but the name of the informant or the source of the information is not given. Such an affidavit is perfectly worthless, and if it were necessary for the petitioners to show corruption on the part of the plaintiff, or that he made the compromise owing to the false representations, we would regard the allegations as not made out by the affidavits and we would dismiss the petitions. Apart, however, from these special allegations, we think that a recital of the admitted facts of the litigation are sufficient to justify us in making the petitioners parties.

The disputes between the Shanars and the Anti-Shanars with respect to the claim of the Shanars to enter the plaintiff temple and other Hindu temples were of some standing and led to serious riots with much loss of life and property. The plaintiff, as trustee of the temple, filed the suit for a declaration that neither the defendants nor other Shanars were entitled to enter the temple, and asking for an injunction, and for damages to defray the cost of purificatory ceremonies necessitated by the defendants having unlawfully entered the temple and defiled it.

Issues were framed with regard to the alleged rights of the defendants and were enquired into at great length, some 135 witnesses being examined and over 100 documents exhibited, and after a trial which lasted some three months and involved much expense, the Subordinate Judge found that the defendants have not been allowed to use the plaintiff temple in the past for worship, and that the custom set up by them in support of the right of entry has not been made out, and that the defendants belong to a class which, under customs and the Shastras, are precluded from entering the plaintiff temple. He, therefore, gave the plaintiff the declaration and injunction asked for, and a decree for Rs. 500 for purificatory ceremonies. The plaintiff, representing the Anti-Shanars, was thus victorious all along the line. In the present proposed compromise he gives up everything and more than everything for which he has hitherto strenuously and successfully contended on behalf of those opposed to the pretensions of the Shanars.

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Gurukkal, *et al*
v.
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The compromise recites that "the plaintiff on full and further enquiry is satisfied that, as a matter of fact, the defendants and their caste people have enjoyed the right of access to, and of worshipping in, the temple of Ramnad Zemindary, including the plaintiff temple at Kamudi, in the same manner and to the same extent as the Vellala, Chetti and other Sudra sects of the Hindu community, and whereas plaintiff is advised and instructed that, according to the Hindu Shastras, the people of defendants' caste are entitled to the said right of access and worship with respect to all Hindu temples, and whereas plaintiff has ascertained that the sentiments of the general body of the Hindu community are in favour of the defendants' caste people exercising their said right of access and worship in respect of all Hindu temples." The plaintiff then agrees to allow the defendants and their caste people the same rights as other Sudra servants of the Hindu community in the plaintiff temple, and he gives up the damages awarded to him. Considering the evidence on the record as to the manner in which the claims of the Shanars are viewed by the non-Shanar castes, it is not easy to reconcile this *volte face* with *bona fides* on the part of the plaintiff. But even if personally honest in his change of conviction, there is no reason to suppose that there has been any similar change of conviction on the part of those for whom the plaintiff as trustee brought the suit, particularly as he now himself objects to the compromise. Three of the beneficiaries now come forward and ask to be made parties in order that they may show cause against the compromise being recorded and a decree being passed in its terms in lieu of the existing decree.

The first petitioner is an hereditary officiating priest of the temple, the second is a large landholder of the locality, the third is the son of the plaintiff.

All are worshippers in the temple, and interested in its being kept free from defilement, and the plaintiff's son claims a special interest as being entitled to succeed the plaintiff as hereditary trustee. The petitioners are clearly all beneficiaries who are interested in the trust property regarding which the suit was filed. S. 437, Civil Procedure Code, provides that "in all suits concerning property vested in a trustee, when the contention is between persons beneficially interested in such property, and a third person,

the trustee, shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the court may, if it thinks fit, order them, or any of them, to be made such parties." The last clause is taken from 15 and 16 Vic. O. 86, S. 42, rule 9, and the beneficiaries are made parties in England when the trustee is either wholly uninterested or is adverse to their interest. (*Clagg v. Rowland*,¹ *Payne v. Parker*²). In the former case Vice-Chancellor *Malins* said: "In all cases where the court sees trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it will never make a decree in the absence of those parties who are alone interested in the contest, but will have them brought before the court in order that those who are interested in resisting the demand, may resist it at the proper time, which is the hearing of the cause." We think that the principle is applicable to the present case, and that we ought not to refuse to allow the petitioners to come in as parties in order that they may be at liberty to show if they can, that the Court ought not to pass a decree in accordance with the compromise, which, as they allege, is injurious to their interests, and which certainly gives up all that plaintiff has hitherto contended for on their behalf.

As regards the appellant's second objection, *viz.*, that the petitioners, if made parties, should be joined as plaintiffs in the suit* and not merely as respondents in the appeal, the petitioners have now before us expressed their willingness to be joined in this way. The petitioners have also agreed that, if joined, they will not claim a retrial of the suit, but will be bound by the decision of this court in disposing of the appeals. We resolve, therefore, to allow the petitions to be amended by substituting in each the words "as a co-plaintiff" for the words "as a party respondent in the appeal," and we direct that thereupon the petitioners be joined as co-plaintiffs in the suit on the clear condition that they will not ask to have the suit retried but will be bound by the decision in appeal. The appellants must pay the petitioners' costs.

* *Vide* 4 C. W. N. 68 [*Ed.*]

1. L. R. 3 Eq. 373.

2. 1 Ch. App. 324 (37).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Boddam.

Rajah M. Bhaskara
Sethupathi.Respondent in Appeal No. }
11 of 1900 (*Plaintiff*).

and

Irulappa Nadan
and others.Appellants in Appeal No. }
11 of 1900 (*Defendants*).} *Petitioners**Narayanasamy :
Gurukkal and others.Supplemental Respond- }
ents in Appeal No. }
11 of 1900.} *Respondents.*Rajah
M Bhaskara
Sethupathi
and
Irulappa
Nadan
v.
Narayana-
samy Guruk-
kal*Trustee—Worshippers—Persons for whose benefit institution founded—Inquiry—
Decree of first Court—Compromise by trustee—Giving up rights under first
decree—Lawful agreement—Civil Procedure Code, S 375.*The principles which govern the regulation of religious trusts in England by the
Court of Chancery will *mutatis mutandis* govern religious trusts in this country.Where an institution exists for the purpose of religious worship but the exact
form of worship or the class for whose benefit it was established cannot be disco-
vered from the instrument creating the trust (or there is no instrument at all), the
court can find no other means of deciding those questions than through the medium
of an enquiry into what has been the usage of the worshippers in respect thereto and,
if the usage is a lawful one, it is the duty of the court to support that usage on
the suit, legally instituted, of any person interested. *Attorney-General v. Pearson*,
approved.It is not in the power of managers of the institution to alter the purpose for
which it is founded or to say to the worshippers that the managers have changed
their opinion and that the worshippers should not come to the place of customary
worship unless they conform also to the alteration.It is the duty of the trustee to maintain the customary usage of the institution,
and if he fails to do so, he is guilty of a breach of trust and still more so, if he deli-
berately attempts to effect a vital change of usage and to make it binding on the
worshippers by obtaining a decree of the court to establish it.Where, therefore, the Raja of Ramnad as trustee of the Kamnathi temple brought
a suit for a declaration against the Shanars that they were not entitled to
worship and for injunction and for damages and obtained a decree, and from that
decree the Shanars appealed, and pending such appeal the trustee and Shanars
compromised, by which compromise the trustee gave up all the right under the decree
and some of the worshippers and persons admittedly interested were on application
made parties to oppose the compromise :—(1). *Held*, that the compromise by the trustee was not *bona fide* and not
lawful within the meaning of Section 375, C. P. C.(2). That the decree of the lower Court does not cease to be binding upon the
parties by the mere fact of appeal, though the pendency of the appeal opens the
whole question for the appellate Court

*C. M. F. No. 705 of 1901.

25th September 1901.

(3). That a trustee giving up the right under the decree under appeal will be guilty of breach of trust.

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and
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kal.

Petition praying that the High Court will be pleased to record the compromise the terms whereof are set forth in the agreement filed therewith, and in supersession of the decree of the lower Court to pass a decree in the said appeal No. 11 of 1900 in the terms of the said compromise.

Joseph Satya Nadar, P. R. Sundara Aiyar and V. Krishna-swami Aiyar for the appellants.

P. S. Sivaswami Aiyar, V. C. Sesha Chariar, M. R. Ramakrishna Aiyar, S. Srinivasa Aiyangar and K. N. Aiyar for plaintiff.

The Advocate-General (*J. P. Wallis*) for the 2nd and 3rd supplemental respondents.

Raja T. Rama Row and V. C. Desika Chariar for the 4th supplemental respondent.

K. Srinivasa Aiyangar for the 1st supplemental respondent.

The Court made the following

ORDER:—In this petition the plaintiff and the defendants in O. S. No. 33 of 1898 on the file of the Subordinate Judge's Court of Madura (East), now pending in appeal in this Court, state that they have entered into a compromise of the suit on certain stated terms and ask that the agreement may be recorded and a decree passed in its terms in lieu of the decree passed by the Subordinate Judge in the suit. The petition is made under section 375 of the Code of Civil Procedure which provides as follows:—"If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

The plaintiff brought the suit in his representative character as the trustee of a certain temple, on behalf of the general body of worshippers of the temple, and when it was known that he had entered into a compromise with the defendants, three of the worshippers on whose behalf he had sued, applied (C. M. P. Nos. 603, 604, 605, 606, 637 and 638 of 1901) to this court to be joined with him

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as co-plaintiffs in the suit, in order that they might oppose the present petition. The defendants opposed their application, but in our order of the 18th instant we directed them to be joined as co-plaintiffs on certain terms. They now oppose the present petition, and the plaintiff himself, through his counsel, opposes his own petition, and expresses his desire to withdraw from the compromise. The defendants, on the other hand, desire to enforce the compromise and claim a decree in accordance with it.

The mere withdrawal of the original plaintiff, who signed the compromise, would, by itself, be no ground for refusing to give a decree in accordance with it. *Karuppan v. Ramasami*¹ and *Appasami v. Manikam*², but both the original plaintiff and co-plaintiffs subsequently added, contend *inter alia* that the compromise is not a lawful one, and that for this reason and also because the co-plaintiffs have not joined in it the court ought not to act upon it.

The co-plaintiffs have filed an affidavit alleging corruption on the part of the original plaintiff and other facts in order to show that the compromise is unlawful. The defendants asked for time to answer this affidavit, but we are of opinion that the petition can be disposed of on the admitted facts, and without reference to the disputed allegations of the affidavit.

The fundamental question is whether the compromise is a "lawful" one within the meaning of section 375, Code of Civil Procedure, and in order to determine this, it is necessary to consider the facts of the litigation, the terms of the compromise, and the circumstances under which it was entered into. The defendants belong to the caste of Shanars. The disputes between the Shanars and Anti-Shanars with respect to the claim of the Shanars to enter the plaint temple and other Hindu temples were of some standing and led to serious riots, with much loss of life and property. The plaintiff, as trustee of the temple, filed the suit for a declaration that neither the defendants nor other Shanars were entitled to enter the plaint temple and asking for an injunction and for damages to defray the cost of purificatory ceremonies necessitated by the defendants having unlawfully entered the temple and defiled it. Issues were framed with regard to the alleged rights of the defendants and were enquired into at great length, some 135 witnesses being examined and over 100 documents exhibited, and

1. I. L. R. 8 M. 482.

2. I. L. R. 9 M. 103.

after a trial which lasted some three months and involved much expense, the Subordinate Judge found "that the defendants have not been allowed to use the plaint temple in the past for worship, and that the custom set up by them in support of the right of entry has not been made out; and that the defendants belong to a class which under custom and the Shastras are precluded from entering the plaint temple." He therefore gave the plaintiff the declaration and injunction asked for and a decree for Rs. 500 for purificatory ceremonies. The plaintiff, representing the Anti-Shanars, was thus victorious all along the line. In the present proposed compromise, he gives up everything and more than everything for which he has hitherto strenuously and successfully contended on behalf of those opposed to the pretensions of the Shanars.

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kal.

The compromise recites that "the plaintiff on full and further enquiry is satisfied that, as a matter of fact, the defendants and their caste people have enjoyed the right of access to, and of worshipping in, the temples of Ramnad Zemindari, including the plaint temple at Kamudi in the same manner and to the same extent as the Vellala, Chetti and other Sudra sects of the Hindu community * * *, and whereas, plaintiff is advised and instructed that according to the Hindu Shastras the people of defendants' caste are entitled to the said right of access and worship with respect to all Hindu temples, and whereas the plaintiff has ascertained that the sentiments of the general body of the Hindu community are in favour of the defendants' caste people exercising their said right of access and worship in respect of all Hindu temples." The plaintiff then agrees to allow the defendants and their caste people the same rights as other Sudra sects of the Hindu community in the plaint temple, and he gives up the damages awarded to him.

Considering the evidence on the record as to the manner in which the claims of the Shanars are viewed by the non-Shanar castes, it is not easy to reconcile this *volte face* with *bona-fides* on the part of the plaintiff.

The petition recites that the change of view is the result of "full and further enquiry," but there is nothing to show how or when this was made, and the fact that 1st plaintiff now desires to withdraw from the compromise goes far to show that the allegation is without foundation. But even if the proposal to compromise were the result of an honest change of view on the part of the

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kal.

1st plaintiff, that would not, in our opinion, affect his power to enter into such a compromise. In our opinion the proposed compromise must be regarded as essentially a breach of trust on the plaintiff's part. He is not acting in this matter for himself alone; nor is he dealing with his own property. He is acting for the general body of worshippers in the temple, and he is dealing with what are matters of the most vital interest to them.

It has been judicially established before the Subordinate Judge that the defendants "belong to a class which under custom and the Shastras are prohibited from entering the temple," and their having done so caused defilement which necessitated purificatory ceremonies.

That finding is binding on the plaintiff as well as the defendants, and he cannot take upon himself to say "I have made further enquiries. I am satisfied that the finding of the court is wrong. I shall, therefore, allow the Shanars to enter the temple."

To do this would be to ignore and alter the fundamental character and uses of the temple as ascertained by judicial authority. It is not in the power of the trustees to do this. This principle was laid down by Lord Chancellor *Eldon* in the case of the *Attorney-General v. Pearson* in these words, "Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the court can find no other means of deciding the question, than through the medium of an enquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon enquiry to be such as can be supported, I take it to be the duty of the court to administer the trust in such a manner as best to establish the usage considering it as a matter of implied contract between the members of that congregation? But if, on the other hand, it turns out that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, 'we have changed our opinions and you, who assemble in

this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinion.”

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These words, no doubt, were used with reference to the regulation of religious trusts in England by the Court of Chancery, but we apprehend that, *mutatis mutandis*, the court will be guided by the same principles in this country. Where an institution exists for the purpose of religious worship but the exact form of worship or the class, for whose benefit it was established, cannot be discovered from the instrument creating the trust, (or where, as in the present case, there is no such instrument) the court can find no other means of deciding those questions than through the medium of an enquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers we “have changed our opinions, and you who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the Shastras from entering into the temple.” It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is, in our opinion, guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the court to establish it.

The defendants, however, contend that as the decree of the Subordinate Judge in this case is under appeal, the appeal opens up the whole question as to whether the Shanars are, or are not, prohibited from entering into, and worshipping in the temple, and there is no binding decision as to what the usage is, and therefore no breach of trust on the 1st plaintiff's part in making the agreement to admit the Shanars to the temple. This contention,

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it seems to us, rests on a fallacy, and is invalid. The appeal, no doubt, opens up the whole question for the decision of the appellate court, but pending that decision, the decree of the Subordinate Judge does not cease to be binding on the parties. Pending that decision they are just as much bound by the decree as if there was no appeal. In view, then, of the finding of the Subordinate Judge that the Shanars are prohibited by custom and by the Shastras from entering the plaint temple, we must hold that the proposed compromise by the 1st plaintiff involves a breach of trust on his part, and is therefore not a lawful compromise within the meaning of section 375 of the Code of Civil Procedure. We, therefore, dismiss the petition. The 1st plaintiff and the defendants will bear their own costs respectively, and they will pay the costs of the co-plaintiffs in this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Velu Rengasami Chetty and others ... Appellants *
(Defendants 2 to 4).

v.

Balakrishna Reddi ... Respondent
(Plaintiff).

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sami Chetty
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Mortgage debt—Relinquishment by mortgagee—Absolute and not conditional.

Where a mortgagor should relinquish his right absolutely in consideration of receiving some other property, he would not be entitled to fall back upon his mortgage unless such relinquishment was conditional upon the conveyance of the property.

Second Appeal from the decree of the District Court of South Arcot in A. S. No. 50 of 1900, presented against the decree of the Court of the District Munsif of Panruti in O. S. No. 684 of 1899.

1st defendant Royalu and his nephew Ramasami were members of a joint family. Royalu executed on 21st September 1889 a hypothecation (Exhibit B) to plaintiff Balakrishna Reddiar for Rs. 200. Ramaswami executed hypothecations (Exhibits E and F) for Rs. 200 and Rs. 3,407-8-0 respectively on 1st August 1888 and 7th July 1889. These two hypothecations (E and F) were attested

by Royalu the uncle. The uncle and nephew became divided on 20th July 1889. Royalu sold the plaint and other properties on 15th April 1891 to Gangadhara subject to the mortgage under Exhibit B. Gangadhara sued for possession in O. S. 149 of 1893, and they settled their claims by a compromise (Exhibit C), which is subscribed to by the present plaintiff Balakrishna Reddiar in token of his assent. Under this compromise the plaint properties were absolutely given to Gangadhara and Balakrishna was given some other properties. Gangadhara sold his properties to defendants 1 to 3, and Balakrishna failing to get possession of the properties under the compromise brought this suit to enforce his mortgage under Exhibit B. The District Munsif dismissed plaintiff's suit, but the District Judge reversed it and gave plaintiff a mortgage decree. Hence this 2nd appeal.

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V. Krishnaswami Aiyar and T. Rangaramanuja Chariar for appellant.

P. Natesa Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Exhibit C the Razinama between the plaintiff and 2nd defendant in O. S. No. 149 of 1893 conclusively shows that the plaintiff herein relinquished the debts due to him by the 1st defendant therein under certain mortgage bonds the property comprised in which along with other property was allotted to the one-half share of Gangadhara, the plaintiff therein and that in consideration of this relinquishment the plaintiff herein was to receive 4 kanis of land therein described. In proof that plaintiff entered into such a transaction, his attestation was taken to Exhibit C in which such transaction was recited. Acting on this transaction Gangadhara obtained a decree on the compromise he entered into in C with the 2nd defendant. But for the plaintiff's consent to the transaction, Gangadhara would have insisted on an allotment to him of additional property in satisfaction of his full half share. We may add that as between the plaintiff herein on the one hand and the plaintiff and 2nd defendant in O. S. No. 149 of 1893 on the other the transaction by which the former relinquished the debt due under the bond and the mortgage security in consideration of his getting the 4 cawnies of land was only oral and not effected by a written instrument requiring registration, but the transaction was recited in the Razinamah entered into between the plaintiff and

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the 2nd defendant therein. The plaintiff is therefore clearly estopped from now asserting his mortgage right against the vendees of Gangadhara, the defendants Nos. 2 to 4.

The fact that the plaintiff failed to recover the 4 kanis to which he was entitled under the transaction recited in Exhibit C does not entitle him to enforce the mortgage. The property in the 4 kanies was at the time of the transaction either jointly in Gangadhara and Ramaswami or solely in the latter. In either case the relinquishment by the plaintiff of the debts due to him and the security therefor was not made conditional on the conveyance of the property, and it was competent for the plaintiff to have maintained a suit against either or both for specific performance if a registered conveyance was necessary.

As a fact he did bring a suit against both to recover possession. Gangadhara pleaded that he had no interest in the property, but the suit was contested by Ramaswami and the plaintiff abandoned the suit, stating that it was unsustainable in law. Subsequently Gangadhara while the present suit was pending executed at the instance of the appellants a release in respect of the 4 kanies in plaintiff's favour. It will thus be seen that Gangadhara did all that he could to give effect to Exhibit C as far as he was concerned. We must set aside the decree of the lower appellate Court and restore that of the District Munsif with costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kadir Mohideen Marakkayar ...	Appellant*
v.	(2nd Defendant.)
Muthukrishna Aiyar and another ...	Respondents
	(Plaintiff and 6th Defendant).

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*Civil Procedure Code, S. 368—Income-tax Act (II of 1886), S. 30—Probate Act, S. 38
—Sale for arrears of Income-tax—Effect and incidents of,—Death of defendant
—Legal representatives—Person brought on record—Right of representation—Lis pendens.*

S. 30 of the Income-tax Act has not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income-tax. Its effect is simply to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890 to the recovery of arrears of income-tax. Kadir Mohideon Marakkayar v. Muthukrishna Aiyar.

A sale by the Collector for arrears of income-tax under S. 30 of the Income-Tax Act II of 1886 can, as in the case of an Abkari sale, affect only the defaulter's interest in the property sold and will not pass the property to the purchaser free of incumbrances.

Ramachandra v. Pitchaikanni,¹ followed.

Under S. 368 of the Civil Procedure Code, a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters upon the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and a decree passed in such suit will in the absence of fraud or collusion bind the estate though the person entered on the record is not the true representative or is only one of several representatives.

A purchaser in a sale for arrears of income-tax of the interest of a defaulter's representative is a voluntary purchaser and is not an assignee '*in mutuum*' like the Official Assignee, and is, therefore, affected by the doctrine of *Lis pendens*.

Wood v. Surr,² and *Punithavelu Mudalsar v. Bhashyam Aiyangar*,³ distinguished.

Such a purchaser is, therefore, bound by a mortgage decree and a sale in pursuance of such decree extinguishes the purchaser's equity of redemption. *Kunhi Umah v. Ahmed*,⁴ followed.

Ouster.—A person prosecuting or defending a suit of a deceased party will be accountable to others who like himself are also the legal representatives or to the true legal representative.

Where, therefore, a mortgagee brought his suit to enforce the mortgage as against the mortgagor and pending the suit the latter died leaving 5 persons as legal representatives and only one of them was brought on the record as legal representative and a decree obtained and the interest of one of the representatives not so brought on the record was sold by the Collector for arrears of income-tax and the mortgage decree not being satisfied, the mortgage-decree was executed and the plaintiff became auction-purchaser:—

Held (1), that the decree bound even the representatives not brought on the record;

(2), that the purchaser in the revenue sale was affected by the doctrine of *Lis pendens*;

(3), that the purchaser in execution of the mortgage-decree obtained a valid title to the whole property.

Second Appeal from the decree of the Subordinate Judge's Court of Madura (West) in A. S. No. 444 of 1899 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 224 of 1898.

1. I. L. R., 7 M. 494.
2. 19 Béav. 551.

3. I. L. R., 25 M. 406.
4. 14 M. 491.

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A. S. Balasubrahmanya Aiyar for *V. Krishnasawmi Aiyar*
and *A. Nilakanta Aiyar* for appellant.

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Muthukrishna
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T. B. Venkatarama Sastri for *P. S. Sivaswami Aiyar* for 1st
respondent.

The Court delivered the following

JUDGMENT :—Plaintiff, as the assignee of a mortgage executed by 1st defendant's father Kadir Lavvai, brought O. S. No. 540 of 1894 against Kadir Lavvai to enforce the mortgage by sale. During the pendency of the suit and before the passing of the decree Kadir Lavvai died and the name of his son, the 1st defendant, was on plaintiff's application entered on the record as legal representative in place of the deceased defendant under S. 368 of the Civil Procedure Code. Subsequently on the 20th December 1899, a decree was passed *ex parte* against the 1st defendant as legal representative of the deceased defendant directing the sale of the mortgaged property. Plaintiff purchased the property at the sale held on the 7th September 1897, in execution of the decree and the sale was confirmed on the 8th November 1897. After obtaining the usual certificate of sale which purported to convey to the plaintiff the whole of the mortgaged property, as it must be assumed, as that of the deceased defendant, the mortgagor, he obtained delivery of the same under section 318 of the Civil Procedure Code on the 18th February 1898. He was subsequently dispossessed by defendants 2 to 5 at the instigation, as is alleged, of the 1st defendant. Hence this suit which was instituted on the 22nd July 1898.

It is admitted that Kadir Lavvai left three sons and two daughters, of whom 1st defendant was the eldest, and that none but the 1st defendant were joined as the legal representatives of the deceased Kadir Lavvai in O. S. No. 540. It is found by both the courts that subsequent to the decree in the above suit, Mohamed Moideen, the 2nd son of Kadir Lavvai, was assessed to income-tax, and that for arrears of tax due by him, the mortgaged property was sold under the Revenue Recovery Act and purchased by the 2nd defendant on the 15th July 1896. The decree in O. S. No. 540 is not impeached as having been obtained by fraud or collusion. Both the courts below have decreed the plaintiff's claim.

Second defendant appeals against the decree, and the only points urged before us in support of the appeal are that the decree in O. S.

540 can at the most only bind 1st defendant's share in the mortgaged property, and that it will not affect the shares of the other heirs of Kadir Lavvai as they were not made parties to it, and that the sale of the mortgaged property under the Revenue Recovery Act for realising arrears of income-tax will vest the same in the 2nd defendant, the purchaser, free of the mortgage encumbrance, at any rate so far as the share of Mohamed Moideen is concerned.

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It will be convenient to consider the latter contention first. Mohamed Moideen was not assessed to income-tax as representing all the heirs of Kadir Lavvai in respect of income derived by or for all of them, but was assessed for income derived by him individually or, it may be, in partnership with two strangers with whom he carried on trade. Under section 30 of the Income-tax Act (II of 1886) the Collector may, in default of payment of the tax, recover the amount as if it were arrears of land revenue or by any process applicable to the recovery of a Municipal or Local tax, or may pass an order for recovery of the amount from the defaulter, which order may be executed as a decree for payment of money passed under the Code of Civil Procedure. The defaulter, Mohamed Moideen, had a several share in the mortgaged property as one of the heirs of Kadir Lavvai and that alone could legally have been proceeded against for the recovery of the tax payable by him. In the present case the Collector proceeded to recover the amount under Act II of 1864, as if it were an arrear of land revenue, and the sale can affect only the defaulter's property, i. e., his share in the mortgaged property and not the shares of the other co-heirs. The contention that the whole of the mortgaged property would pass to the 2nd defendant under such sale is, therefore, manifestly untenable.

The next question is whether under such sale the share of Mohamed Moideen would pass to the 2nd defendant free of the mortgage encumbrance which was affirmed by the decree in O. S. No. 540 of 1894, as if the income-tax due by Mohamed Moideen were revenue which accrued due in respect of the land forming his share in the mortgaged property, in which case under section 2 of Act II of 1864 the land, the buildings upon it, and its

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products form the security for the public revenue. We are clearly of opinion that section 30 of the Income-tax Act has not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income-tax, but that its effect simply is to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890 for the recovery of arrears of income-tax.

The decision of this Court in *Ramachandra v. Pitchaikanni*,¹ which relates to a sale under Act II of 1864 for arrears of Abkari revenue due under Act III of 1864, and the reasoning on which the decision proceeds are equally applicable to a sale under Act II of 1864, for arrears of income-tax. The difference in the wording between the corresponding sections of the Income-tax Act and Abkari Act is merely verbal

In our opinion, therefore, the second defendant by his purchase acquired only the equity of redemption in respect of Mohamed Moideen's share in the mortgaged property, and this leads to the consideration of the two questions involved in the 1st contention, *viz.*, whether the decree in O. S. No. 540 of 1894 will bind such share notwithstanding that Mohamed Moideen was not joined in the suit as one of the legal representatives of Kadir Lavvai, and whether, if it so binds, the sale in execution thereof which took place subsequent to the 2nd defendant's purchase in the revenue sale would extinguish his equity of redemption, notwithstanding that he was made no party to the execution proceedings.

As already stated, on the application of the plaintiff, the 1st defendant's name was entered on the record in the place of the deceased defendant as his legal representative. He raised no objection that he was not the, or the sole, legal representative of the deceased defendant, and that there were others who ought also to be joined, nor did Mohamed Moideen or any of the other co-heirs apply, as they might, under the last paragraph of section 368 of the Civil Procedure Code (as amended) to have his or their names joined as legal representatives in place of the deceased defendant. In our opinion, a person whom the plaintiff alleges to be the legal representative of the deceased defendant, and whose name the court enters on the record in the place of such defendant, sufficiently represents the

estate of the deceased for the purposes of the suit, and in the absence of any fraud or collusion the decree passed in such suit will bind such estate. It will of course be open to any other person who is or claims to be the legal representative or one of the legal representatives of the deceased defendant to apply to have his name also entered on the record as a legal representative in the place of the deceased defendant. Even before section 368 of the Civil Procedure Code was amended to this effect, such course was adopted in *Athiappa v. Ayanna*¹. If this were not the law, it will in no few cases be practically impossible to secure a complete representation of a party dying pending a suit, and it will be specially so in the case of a Mahomedan party: and there can be no hardship in a provision of law by which a party dying during the pendency of a suit is fully represented for the purpose of the suit, but that only for that purpose, by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representatives or may not be the true legal representative. If the true legal representative or all the legal representatives do not intervene, it can be due only to his or their laches. This is the principle of representation which obtains under the English Law when it is necessary that the representative of a person deceased be made a party to a pending suit, and that principle is reproduced in section 38 of the (Indian) Probate and Administration Act. A person prosecuting or defending a suit as the legal representative of a deceased party will of course be accountable to others who like himself are also the legal representatives of the deceased or to the true legal representative as the case may be.

Among the heirs of Kadir Lavvai none but the 1st defendant who has not put in an appearance in this suit and Mohamed Moideen as represented by the 2nd defendant, the assignee of his share, are parties to this suit. It is unnecessary to consider and reconcile the cases referred to in the judgments of the lower courts, which, with a few additional cases, were also cited in the argument before us. 'With the exception perhaps of the *The General Manager of The Raj Durbhanga v. Maharaja Comar Ramaput Sing*², they are all cases in which the debtor died before

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1. I. L. R., 8 M. 300.

2. 14 M. I. A. 605.

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the suit and the suit was brought against only one or two of his representatives excluding the others or against a person who was not the true representative and not as here, in which the suit was brought against the debtor himself.

In the *The General Manager of The Raj Durbhanga v. Maharaja Comar Ramaput Singl*¹, it is not clear whether one of the two suits for rent due by the deceased was brought against himself and his widow joined as legal representative on his death pending suit, or the suit itself was brought against her as his legal representative. It would appear from the head note that the former was the case, but it does not appear clearly from the report of the case that it was so. The Judicial Committee of the Privy Council held that though the deceased left him surviving a son, who must be taken to be his legal representative and not the widow, yet the sale in execution of the decree in that suit was not of the widow's personal interest; but of that of the representative of her deceased husband, notwithstanding that the suit was not brought or continued against the son who in law was the true legal representative of the deceased.

The cases of *Bhikkaji Ramchandra v. Purshotam*², *Ghamandi Lal v. Amir Begam*³, and *Musala Reddi v. Ramayya*⁴ relate to the question of the abatement of an appeal when the appellant died pending the appeal, and his legal representatives were not all brought on the record within the period of limitation and those cases have no direct bearing upon the question now under consideration.

The only point which remains to be considered is whether the 2nd defendant's equity of redemption in respect of Mohamed Moideen's share was extinguished by the sale in execution of the decree in O. S. No. 540 of 1894, and this depends upon the application of the law of '*Lis pendens*' to an involuntary sale in execution proceedings of the judgment debtor's interest in the property affected by the decree. If Mohamed Moideen had actually been a party to the decree, could the 2nd defendant assert his equity of redemption and seek to redeem Mahomed Moideen's share notwithstanding the sale in favor of the plaintiff in execution of the decree in O. S. No. 540. This question is concluded against the appellant by the decision of this Court in *Kunhi Umah v.*

1. 14 M. L. A. 605.
2. I. L. R., 10 B. 220.

3. I. L. R., 16 A. 211.
4. I. L. R., 23 M. 126.

Amed, and the other decisions therein cited. As observed by the learned judges in that case, the 2nd defendant, after he became the purchaser in the revenue sale of the equity of redemption pending execution of the mortgage decree "ought to have paid the amount under the mortgage decree and prevented the sale in execution in the same way in which the mortgagors might have done." It can in principle make no difference whether Mohamed Moideen was actually a party on record or was sufficiently represented by the 1st defendant. If the 2nd defendant had been a purchaser at a revenue sale for arrears of land revenue which accrued due in respect of the land purchased by him, the case would be quite different and the doctrine of '*Lis pendens*' would not apply, for, in that case the revenue sale would be in enforcement of a right of the Crown paramount to the mortgage right sought to be enforced by the decree of the Civil Court, and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income-tax. A purchaser in a revenue sale is a voluntary purchaser and as such is affected by the doctrine of '*Lis pendens*' and is not an assignee '*in invitum*' like the Official Assignee who is not affected by the doctrine of '*Lis pendens*' (*Wood v. Surr*², O. S. Ap. No. 2 of 1901 not yet reported³.)

The second appeal, therefore, fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Davies, and Mr. Justice Moore.

Chelapathi and others *Appellants**
(Defts. 1 to 4).

v.

Surayya *Respondent*
(Plaintiff).

Pledge—Rights of pledges to sell goods—Principal and agent—Agent for sale—Direction to sell only on instruction—Sale in contravention of direction—Loss—Agent's liability—Damages, measure of—Nominal and substantial—Acquiescence—Personal liability.

A contract of pledge will entitle the pledgee to sell without instructions from the pledgor. But a contract creating only the relation of principal and agent and

* A. 39 of 1900.

15th November 1901.

1. I. L. R., 14 M. 491.

2. 19 Beav. 551.

3. See I. L. R., 25 M. 406.

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authorising the agent to sell the principal's goods for commission with the latter's instructions would not authorize the agent to sell in contravention of the principal's directions.

A sale made by such agent in contravention of the principal's direction is wrongful and the principal will be entitled at least to nominal damages. The principal will also be entitled to recover substantial damages if he succeeds in proving the damages, i. e., such damages as would place the principal in the position in which he would have been if the agent had not wrongfully sold the goods.

Manchubai Navalchand v. John H. Tod, distinguished.

The principal is under no obligation to the agent to replace the goods wrongfully sold by the agent by entering into a speculative transaction to reduce the damages claimable from the agent.

The measure of damages in such a case is the difference between the price the goods fetched at the agent's sale and that which the goods would have fetched at the time when the principal might reasonably be held to have been willing to sell.

Where there is evidence of acquiescence on the part of other members to a contract by the managing member, the persons so acquiescing will also be treated as contracting parties and will be personally liable on such contract.

Appeal from the decree of the District Court of Kurnool in O. S. No. 6 of 1899.

P. S. Sivaswami Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—In this case the finding of the District Judge that the contract between the parties was one of pledge cannot be supported. The District Judge's view was that if the contract was not one of pledge from the beginning, it became one as from the time when the plaintiff began to make advances in compliance with the 1st defendant's letter of July 17th, 1897 (B5). There are no doubt expressions in the defendant's letters of July 15th and 17th which, taken by themselves, may be said to support the view that the goods in question were pledged by the defendant to the plaintiff as security for money advanced. In the letter of July 15th (B4) he writes, "Therefore we mean to deposit these bales with you for sale and get money." In the letter of July 17th he writes, "Therefore we mean to send you one hundred or two hundred bales to be held in deposit. We require money also upon those goods." But taking the evidence and the correspondence as a

whole, we feel no doubt that the relation between the parties was Chelapathi that of principal and agent for sale on commission, and not that of ^{v.} Surayya. pledgor and pledgee. Advances were made by the plaintiff before any cotton was sent by the defendant. Moreover, all the advances were repayable on demand. The agreement was that commission should be charged on the goods sold, and the course of business as described by the plaintiff in his plaint shows beyond all doubt that the goods were consigned by the defendant to the plaintiff for sale by the plaintiff on defendant's behalf for the benefit of both parties and not by way of pledge. The plaintiff had a lien on the goods consigned, but this lien carried with it no right of sale. The authority given to the plaintiff to sell on the defendant's behalf, according to the contract as disclosed in the correspondence, was an authority to sell on the express directions of the defendant, the principal, and not otherwise. For instance, on July 17th, 1897 defendant writes, "We shall wait up to the month of *Shravana* in respect of the said cotton. If prices rise up we shall sell them then only." On July 26th the plaintiff writes "When you write to sell we shall do so." On July 31st he writes, "Write when to sell. The price at present is Rs. 114." On August 16th he writes, "We shall wait till (i. e., as long as) you ask us to wait." On September 21st, defendant writes, "Do not sell without our orders." Until January 1898 there is no suggestion on the part of the plaintiff that he had any right to sell except under the defendant's directions. On January 24th he threatens to sell according to price unless the defendant makes him a remittance. In answer to this threat the defendant writes on January 26th, 1898, "Do not sell the cotton at this low price without our order." On April 4th defendant authorized the plaintiff to sell 100 candies (out of the 176 consigned) if the price reached Rs. 100 a candy. (The price at that time was considerably below Rs. 100 and does not appear to have reached Rs. 100 until the latter part of 1899.) After an interval of some four months, on August 2nd, 1898, the plaintiff renewed his threat to sell at current rates, and on August 15th, the defendant again directs him not to sell and repeats these directions on August 22nd and on September 27th. In October the plaintiff sold 98 bales and the defendant writes on October 30th, that he will hold the plaintiff responsible for the loss. The remaining bales were sold by the plaintiff in January 1899.

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In view of these letters Mr. Krishnasami conceded and properly conceded that unless the contract could be regarded as a contract of pledge, the sale by the plaintiff of the defendant's goods in contravention of the defendant's directions was wrongful. He contended, however, that the defendant was only entitled to nominal damages inasmuch as the defendant could have made good his loss by buying fresh cotton at the low prices which prevailed when the sales were made and replacing the goods which had been wrongfully sold by the plaintiff. Our attention was called to a Bombay case (*Manchubai Navalchand v. John H. Todl*), in which the facts were similar to those in the present case, and in which it was held that the plaintiff was only entitled to nominal damages. In that case, however, it was held that, on the facts, the plaintiff had failed to prove any damages. In the present case, the defendant's object in his transactions with the plaintiff was to get certain consignments of cotton resold at a profit. The plaintiff (the agent) acted in contravention of the directions which he had received from the defendant (the principal) with the result that it became impossible that these consignments could be sold at a profit. In these circumstances, it seems to us that the defendant was under no obligation to replace the goods which had been wrongfully sold by the plaintiff with a view to reselling them if and when the market rose. He was not bound to enter into a speculative transaction which might have resulted in his being able to recoup himself and might have resulted in a further loss. It is clear that if he had bought fresh cotton and this transaction had resulted in a further loss he would not have been able to recover this further loss from the plaintiff as consequential damages. In our opinion, it follows that he was not bound to enter into a speculative transaction with the view of reducing the loss which, as events turned out, he was able to prove he had sustained by reason of the plaintiff having acted in breach of his duty as agent. If the defendant had been unable to prove that within a reasonable time after the sale by the plaintiff the price of cotton had risen above the rate at which the plaintiff sold, it may well be that the defendant would have been entitled to nothing more than nominal damages. But that is not the case here. We think the defendant is entitled to such damages as would place him in the position which he would have

been in if the plaintiff had not, in breach of his duty as agent, sold the defendant's goods. At the time of the consignment (July, 1897) the market price was Rs. 114 per candy, but it is in evidence that in April 1898 the defendant was prepared to sell 100 candies out of the consignment of 176 at Rs. 100 per candy if that price had been then obtainable. As a matter of fact the market price in April '98 does not seem to have been more than Rs. 75 per candy and it remained somewhere about that figure till July '99. According to the plaintiff's witnesses the price in November '99 was about Rs. 112. There is no evidence when the rise began, but we may take it that the price reached Rs. 100 for the first time about October 1899. For the purpose of assessing damages we assume that the defendant would have been willing to sell in October 1899, at the price at which he would have sold, (if the price had been obtainable) in April '98. Taking the difference between the price at which the plaintiff sold in violation of his duty and the price at which (as we assume) the defendant would have been willing to sell, and would have sold, in October '99, and deducting a sum for depreciation on account of the cotton being old, and taking into account the moneys for which the defendant would have been chargeable by way of interest if the plaintiff had not sold and so, in part, discharged the defendant's debt, we assess the defendant's damages at Rs. 1,500.

As regards the alleged payment of Rs. 6,000 by the 1st defendant to the plaintiff, we agree with the finding of the District Judge. The 1st defendant's story as to the circumstances in which this payment is alleged to have been made is altogether improbable and the evidence in support of it appears to be quite untrustworthy. The conclusion we have come to is that the payment was never made and that the document which purports to be a receipt dated November 1, 1898, is a forgery.

We feel no doubt that the plaintiff is entitled to a personal decree as against the defendants 1, 2 & 3. As regards the defendants 2 and 3 there is evidence of acquiescence on their part in the course of dealings in which the contract was entered into which warrants their being treated as contracting parties. There is no such evidence as regards the 4th defendant who, at the time of

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v.
Turayya,

the suit, was a minor. The decree, therefore, as against the 4th defendant must be limited to his share in the family assets.

The decree gives no interest to the plaintiff. He is entitled to interest at the rate of 9 per cent. per annum on the principal amount from the date of plaint until the date of decree, and at the rate of 6 per cent. per annum from the date of the decree until payment.

The decree must be modified by allowing in account, the sum of Rs. 1,500 to the defendants by way of damages, by allowing the plaintiff interest as above stated and by limiting the liability of the 4th defendant under the decree to his share in the family assets.

As regards the costs, we direct that the defendants pay the proportionate costs of the plaintiff on the decree amount as modified by this court throughout. We allow no costs to the defendants. Our reason for depriving the defendants of costs is that we believe the case put forward by the 1st defendant with reference to the alleged payment of Rs. 6,000 is false.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Meenatchee Achi Appellant*
and Petitioner†
(2nd Plaintiff).

v.

Ananthanarayana Aiyar and another .. Respondents
and Counter-
Petitioners
(1st and 2nd
Defendants).

*Civil Procedure Code, Ss. 2, 305, 368, 540 and 622—Succession Certificate Act, S. 16—
Order dismissing suit as abated—Decree—Order striking out representative—
Revision—Objection to legal representatives when to be raised—Court's duty on
representative being brought on record.*

Meenatchee
Achi

v.
Ananthanara-
yana Aiyar.

An order dismissing a suit as abated is a decree from which an appeal and a second appeal will lie.

* S. A. No. 1182 of 1900.

16th April 1902.

† C. R. P. 343 of 1900.

*Subbayya v. Saminadayya*¹ followed.

An order passed by the District Judge dismissing an appeal from the order of the Munsif directing the name of the representative already brought on the record to be struck out is liable to revision under S. 622, C. P. C.

Meenatchee
Achi

v.
Ananthanara-
yana Aiyar.

An objection that a person is not the legal representative of the deceased plaintiff must be taken at the earliest opportunity and before the person's name is entered on the record as the legal representative. When once the name of a person is entered on the record under S. 365, C. P. C., in the place of the deceased plaintiff as the latter's representative, the court is bound to proceed with the suit. A widow, holding a succession certificate for the debt alleged to be due to her husband is alone entitled to bring a suit for such debt and to recover the same. If her husband had brought the suit and died, the widow, as holder of the succession certificate, will also be entitled as of right to prosecute the suit of her husband.

Where, therefore, the deceased plaintiff brought a suit for the recovery of a debt and pending the suit died issueless and his widow applied to be brought on the record within the time allowed by limitation as representative of the deceased plaintiff and she was so brought on the record, and it appeared in the course of the trial that the deceased left an undivided brother who, however, disclaimed all interest and expressed his willingness to join and the defendant objected that the widow was not the proper legal representative —

Held (1), that the objection was too late and that no order for abatement could be passed after the widow was once entered on the record; and

(2), that the widow holding a succession certificate was the only person who could represent her husband and continue the suit for the debt in question.

Second appeal from the decree of the District Court of Madura in A. S. No. 154 of 1900, presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 362 of 1898.

Petition under section 622 of the Civil Procedure Code, praying the High Court to revise the order of the District Court of Madura, dated 16th July 1900, in C. M. A. No. 9 of 1900, presented against the order of the Court of the District Munsif of Sivaganga, dated 21st September 1899 in C. M. P. No. 1307 of 1899 in O. S. No. 362 of 1898.

C. Ramachandra Row Sahib for appellant and petitioner.

P. S. Sivaswami Aiyar for 1st respondent.

J. G. Smith for 2nd respondent.

The Court delivered the following

JUDGMENT :—Following the decision in *Subbayya v. Saminadayyar*¹, we overrule the preliminary objection that S. A.

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Achi
v.
Ananthanara-
yana Aiyar.

No. 1132 of 1900 does not lie. As an appeal lies, C. R. P. No. 386 of 1900* which was presented in the alternative is rejected, but without costs. We also overrule the preliminary objection that C. R. P. No. 343 of 1900 which is preferred against the order of the District Judge in C. M. A. No. 9 of 1900 does not lie by reason that the appeal did lie to the District Court, and that though the Munsif who passed the order appealed against acted in the exercise of his jurisdiction with material irregularity, yet the order passed by the District Judge on appeal cannot be revised by this court under section 622, Civil Procedure Code, though in the exercise of his appellate jurisdiction he failed to set aside the order appealed against which was erroneous in consequence of the Munsif having acted with material irregularity in the exercise of his jurisdiction. The suit was instituted by one Lakshmanan Chetty for the recovery of a debt either from the 1st defendant or from the 2nd defendant. Pending the suit the plaintiff died issueless, and within two months and a half of his death his widow, Nachiammai Achi, applied under section 365 of the Civil Procedure Code as the legal representative of the deceased plaintiff to have her name entered on the record in place of the deceased plaintiff. This application was made on the 14th of April 1899, and her name was entered on the record on the 15th idem. The suit was then adjourned from time to time, and after the trial of the suit extended over several weeks, the 1st defendant on the 20th of September 1899 presented a petition purporting to be under sections 365 and 367, stating that it became evident during the trial from the deposition of plaintiff's 2nd witness, that the deceased plaintiff left an undivided brother by name Narayana Chetti, and that, even if the widow obtains a certificate of succession, it will be of no avail for the suit, and the court must decide the question finally under section 367, Civil Procedure Code, as to who is the legal representative of the deceased plaintiff. The District Munsif after hearing the plaintiff's vakil held on the 21st of September, without making any elaborate enquiry that the widow was the proper heir and that she should produce a succession certificate before judgment in the case, and he also directed in order to prevent future disputes

1. I. L. R., 18 M. 496.

* This was also presented by the same appellant-petitioner under the circumstances stated in the judgment.

that Narayana Chetti be also joined as a party. Narayana Chetti presented a petition signifying his willingness to be joined as a co-plaintiff with the widow without prejudice to the widow recovering the amount sued for as he, the petitioner, was not entitled to the same. Against both these orders, the 1st defendant preferred C. M. A. Nos. 12 and 13 to the District Judge who, by his orders, dated 29th November 1899, directed the District Munsif to hear all the evidence which the parties may adduce and, after holding a proper judicial enquiry, to determine whether the widow of the deceased plaintiff is or is not entitled to be admitted as the legal representative of the deceased plaintiff and he also set aside the order of the District Munsif joining Narayana Chetti as co-plaintiff. He thereupon held an elaborate enquiry between the widow on the one hand and the 1st defendant on the other as to who the legal representative of the deceased plaintiff was, and rightly or wrongly came to the conclusion that she was not the legal representative and "struck off her name from the record," the name of Narayana Chetti having already been struck off. He then passed judgment (holding) that the suit abated and passed a decree dismissing the suit with costs. The widow preferred C. M. A. No. 9 of 1900 to the District Judge against the order of the District Munsif, dated 12th February 1900, holding that she is not the legal representative of the deceased plaintiff and striking her name off from the record, and she also preferred to the District Judge Appeal No. 154 of 1900 against the decree of the District Munsif, dated 13th February 1900, dismissing the suit with costs. The District Judge concurring with the District Munsif that the widow did not establish her right as the legal representative of her husband, dismissed both the appeals on 16th July 1900.

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v.
Ananthanara-
yana Aiyar.

In our opinion the original order of the District Munsif, dated 21st September 1899, rejecting the 1st defendant's application, dated 20th September 1899, and directing in view to prevent future disputes that Narayana Chetti also be joined as a party, was perfectly right, and it ought not to have been reversed by the District Judge on appeal. No objection was raised to the widow's name being entered on the record in the place of the deceased plaintiff under section 365 before her name was so entered, and neither of the defendants raised any objection to her prosecuting the suit for seve-

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v.
Ananthanara-
yana Aiyar.

ral months after her name was so entered and a number of witnesses had also been examined, and it is only towards the conclusion of the trial that the 1st defendant and he alone presented a petition questioning the widow's right to prosecute the suit as the legal representative of the deceased plaintiff. Assuming that the defendants had the right to raise such an objection, that right accrued to them on the death of the plaintiff and they were bound to use all reasonable diligence in acquainting themselves with the state of the family of the deceased in view to ascertain whether the widow was entitled to prosecute the suit as the legal representative of her deceased husband, and they were bound to take the objection at the earliest opportunity if they meant to insist upon their alleged right to raise that objection. After having allowed the widow to proceed with the prosecution of the suit till it almost reached its conclusion, they have precluded themselves from raising such objection at a late stage of the suit. Assuming, as in *Oula v. Beepathees*¹ and *Subbayya v. Saminadayyar*², that S. 367, Civil Procedure Code, is applicable not only to a case in which there is a dispute between rival claimants as legal representatives of a deceased plaintiff, but also to a case in which the defendant disputes that the applicant under section 365 is the legal representative of the deceased plaintiff, the present case is clearly distinguishable. For in the first of the two cases above referred to, the objection was raised by the defendant before the applicant's name was entered on the record under section 365, and the defendant did not allow the applicant to prosecute the suit as in the present case as the legal representative of the deceased. Under section 365 it is clear that the Court is bound to proceed with the suit after the name of the applicant is entered on the record in the place of the deceased plaintiff. In the present case if in the succession certificate which was obtained by the widow after the death of her husband the debt in question be specified as presumably it is, her right to prosecute the suit as the legal representative of the deceased and recover the debt is conclusive under section 16 of the Succession Certificate Act (1889). If her husband died before he brought the present suit, it is obvious that the widow as the holder of the succession certificate and she alone would be entitled to bring the present suit and to recover the amount sued for. If so, it is difficult to see on what

1. I. L. R., 17 M. 409.

2. I. L. R., 18 M. 496.

principle she, as the holder of the succession certificate, would not be entitled as of right to prosecute the suit commenced by her husband. The explanation to section 366 has no bearing whatever upon this question. It is unnecessary to refer to several other material irregularities in this case. We allow both the appeal and the revision petition, and setting aside the decrees and orders of both the lower courts, direct that the suit be restored to its original number on the file of the District Munsif and that he do proceed with the trial of the suit from the stage which it reached before his orders, dated 21st September 1899 and 25th September 1899, were erroneously set aside by the District Judge on appeal.

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Achi
v.
Ananthanara-
yana Aiyar.

Both the respondents must pay the costs of the appellant and petitioner in this Court, and the 1st defendant must pay the costs of all the appeals to the lower appellate Court and of the proceedings in the Court of First Instance relating to the enquiry as to the question of the appellant being the legal representative of her deceased husband.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Ramamurthi Aiyar and another ... Appellants*
(3rd and 4th
Defendants).

v.

Subramania Aiyar and others ... Respondents
(Plffs. representatives and 1st.
and 2nd Defdts).

Limitation Act, S. 12—Time taken for copies—No application by appellant—Minority.

Under S. 12 of the Limitation Act, an appellant is entitled to a deduction of the time taken up in obtaining the copies only if he had applied for the same. He is not entitled to a deduction of the time taken by another party in obtaining the copies.

Ramamurthi
Aiyar
v.
Subramania
Aiyar.

The time prescribed for appeal runs even against a minor.

Ramamurthi
Aiyar
v.
Subramania
Aiyar.

Second Appeal from the decree of the Subordinate Judge's Court of Madura (East) in A. S. No. 243 of 1899, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 187 of 1897.

V. Krishnaswami Aiyar, P. R. Sundara Aiyar and K. Srinivasa Aiyangar for appellants.

P. S. Sivaswami Aiyar and A. S. Balasubramania Aiyar for 3rd respondent.

T. V. Seshagiri Aiyar and R. Kuppusami Aiyar for 1st and 2nd respondents.

4th respondent was not represented.

The Court delivered the following

JUDGMENT:—The plaintiffs' representatives, who together with the plaintiff (since deceased) were appellants to the lower Court, put in their appeal some time after the period allowed for entering the appeal had expired.

They had made no application for copies of the decree or judgment appealed from but put in copies obtained by the 2nd defendant who was one of the respondents to the appeal. The Subordinate Judge held that the appeal was in time, because he held that the time taken by the 2nd defendant in obtaining the copies put in could be considered, and also because the plaintiffs' representatives were minors and limitation did not run against them.

We are of opinion that neither of these grounds can be supported and must hold that the appeal was out of time. The memorandum of appeal to the lower Court must be rejected, the decree of the lower Court set aside and the decree of the District Munsif restored with costs of the 3rd and 4th defendants who are appellants here, in this and in the lower appellate Court. The appellants in the lower appellate Court must pay the costs of the 3rd and 4th defendants, the respondents in that court and all the respondents here must pay the appellants' costs in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Kone Goundan Appellant *
(Plaintiff).

v.

Bola Naicken Respondent
(Defendant).

Transfer of Property Act, S. 123—Onus on plaintiff to show invalidity—Gift by grand-father—Grandson not in existence—Acquiescence by father—Long possession—Prescriptive title—Grant by a person to his wife—Nature of estate. Kone Goundan v. Bola Naicken.

The plaintiff who impeaches a gift as invalid under the Transfer of Property Act (not being in writing registered as required by S. 123) must show that the gift was made at a time when the Transfer of Property Act was in force.

When a gift of ancestral property is made by the grandfather to his wife and is assented to by the son it cannot be questioned by a grandson not in existence at the date of the gift.

A gift by a husband to the wife does not confer merely a life-estate but the limited estate of a female known to Hindu Law.

Semle :—Possession held for over the statutory period under a title found to be invalid or unfounded will give the possessor a prescriptive title.

Second Appeal from the decree of the District Court of Coimbatore in A. S. No. 66 of 1898, reversing the decree of the Court of the District Munsif of Udumalpet in O. S. No. 912 of 1896.

P. S. Sivaswami Aiyar for appellant.

H. Raghavendra Row for respondent.

The Court delivered the following

JUDGMENT :—It is perfectly clear from Exhibit II that the grandfather of the plaintiff gave the land in dispute to his second wife, the late Kandiakkal. There is, however, nothing in that document to show that the transfer was made subsequent to the date on which the Transfer of Property Act came into force. The defendant pleaded that the gift was made about 25 years ago, and in such circumstances it lay on the plaintiff who impeaches the gift to show that it was made after the Transfer of Property Act came into force. As there is no evidence on this point on behalf of the plaintiff, we think the lower courts were in error in proceeding on

* S. A. No. 1615 of 1898.

15th November 1898.

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Goundan
v.
Bola Naicken.

the view that the transfer was invalid, as it was not made under a registered instrument as required by the Transfer of Property Act. As the plaintiff was not in existence at the time of the transfer and as his father assented to the transfer, it is not necessary for the defendant to rely on prescription. If any question of prescription arose here, we could not say that we were prepared to accept the contention that possession held for over the statutory period under an alleged title, which is found to be invalid or unfounded, would not avail the party holding the possession.

The view suggested in the passage in the case of *Raja Haimun Chull Singh v. Koomer Gunsheam Sing*,¹ to which our attention has been called, has apparently been departed from by the Judicial Committee itself in several subsequent decisions. It is also not reconcilable with numerous decisions of this and other High Courts. As to the case of *Labrador Company v. The Queen*,² it will be seen if the facts thereof be not overlooked that there is no real conflict between our own view and the ruling in that case given with reference to the provision of the French law: "a person cannot acquire by prescription against his own title in this way that a person cannot himself change the cause and nature of his possession" (Cachard's Civil Code, 508). As, however, no question of prescription arises in this case, it is not necessary to say more on the point. It was next urged, on behalf of the plaintiff, that, assuming the gift is not invalid under the Transfer of Property Act, the donee took only a life estate and, therefore, the alienation in favour of the defendant is not binding on the plaintiff. But the estate, which the grantee took on the hypothesis suggested for the plaintiff, must be taken to be not an estate for life, but the limited estate of a female known to the Hindu Law, and the person entitled to the property on Kandiakkal's death is not the plaintiff but his father. We are unable to agree in the contention that this right to succeed to the property on Kandiakkal's death was intended to be transferred or was transferred to the plaintiff under the partition deed; Exhibit A, which was executed in Kandiakkal's life-time, and which ignores her right and deals with the property as part of the family estate in the possession of the family. The plaintiff's suit was, therefore, not maintainable. The second appeal fails and we dismiss it with costs.

1. 5 W. R. P. C. 69.

2. (1893) A. C. 104.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Narasinga Row Appellant*
(1st Defendant).

v.

Muthaya Pillai Respondent
(Plaintiff).

Malicious prosecution—No prosecution—Action of Police.

Only the person who prosecutes the plaintiff is liable in an action for malicious prosecution.

Narasinga
Row
v.
Muthaya
Pillai.

Where the defendant instituted criminal proceedings before the police and the police after investigation prosecuted plaintiff :—

Held, that no action lay against the defendant for malicious prosecution.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevely in A. S. No. 11 of 1900, presented against the decree of the Court of the Additional District Munsif of Tinnevely in O. S. No. 83 of 1899.

M. R. Ramakrishna Aiyar for appellant.

V. C. Seshachariar for respondent.

The Court delivered the following

JUDGMENT :—We think the decree of the appellate Court should be reversed.

The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case though the 1st defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police after investigation appear to have thought fit to prosecute the plaintiff. The 1st defendant is not responsible for their act, and no action lies against him for malicious prosecution (see judgment in S. A. No. 805¹ of 1900).

We must reverse the decree of the Subordinate Judge and restore that of the Additional District Munsif with costs in this and the lower appellate Court.

*S. A. No. 806 of 1901.

23rd July 1902.

1. See 12 M. L. J., 349 :—*Ed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Kuttan Nayar Appellant*
(2nd Deft.).

v.

Krishnan Mussad and others ... Respondents
(Plaintiff
and 1st and
3rd to 9th
Defendants).

Kuttan Nayar v. Krishnan Mussad. *Transfer of Property Act—Sale in execution of second mortgage decree—Purchase by first mortgagee—No disability—Suit to set aside—Limitation.*

A purchase by a prior mortgagee at a sale held in execution of a decree obtained by the second mortgagee is valid, and even if invalid, must be set aside by a suit brought within one year under Art. 12 of the Limitation Act.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 862 of 1900 presented against the decree of the Court of the Principal District Munsif of Calicut in O. S. No. 862 of 1899.

Plaint property belonged to the plaintiffs' family. His father granted a kanom to the then Karnavan of defendants 1 to 3 on 9th June 1864. Plaintiff's father and his brother executed a second mortgage (simple mortgage) to one Sankaran Nair in 1873. The 2nd mortgagee sued upon his mortgage, obtained a decree and brought the properties to sale in execution of it. The 1st mortgagee (the late Karnavan of defendants 1 to 3) purchased the equity of redemption at such sale. Plaintiff, contending that the purchase was invalid and that the mortgage decree was invalid as the plaintiff's paternal grandmother who was impleaded in the suit, was in fact dead, brought this suit to redeem the kanom of 1864. The Munsif held that the suit was barred. The District Judge reversed it and gave plaintiff a decree. Hence this second appeal.

J. L. Rosario for appellant.

V. Byru Nambiar for 1st respondent.

The Court delivered the following

JUDGMENT:—Following the decision in *Sesha Ayyar v. Krishna Ayyangars* which is based on the judgment of their Lordships of the Privy Council in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan** and dissents from *Erusappa, Mudaliar v. Commercial and Land Mortgage Bank, Limited*,³ we must hold that the purchase was valid, and also following the judgment of the Privy Council in *Malkarjun v. Narhari**, that even if the sale were invalid, the time for setting it aside has passed long ago.

Kuttan
Nayar
v.
Krishnan
Mussad.

We, therefore, allow this appeal, set aside the decree of the District Judge, and restore that of the District Munsif with costs in this court and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Arumuga Sengundan and another ... *Petitioners*.*

Charter Act, S. 29, Criminal Procedure Code, Ss. 145 and 526—Possession case—High Court's power of transfer. Arumuga Sengundan.

A case under S. 145 of the Criminal Procedure Code is a criminal case and the High Court has power to transfer the same to another Magistrate under Criminal Procedure Code, S. 526, and Charter Act, Cl. 29.

*In re Pandurang Govind** dissented from.

Application praying that, in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to order the transfer of Possession Case No. 3 of 1902 from the file of the Sub-Divisional 1st Class Magistrate of Tanjore to that of any other Magistrate in the District.

A. S. Balasubrahmanya Aiyar for petitioner.

The Ag. Public Prosecutor (C. Sankaran Nair) for the Crown.

The Court made the following

ORDER:—We have no doubt of our power to transfer this case under both section 526 of the Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under S. 145 of the Code of Criminal Procedure is not a "criminal case," it is difficult to conceive what it is. With all respect we are unable to agree with the

* Cr. M. P. No. 168 of 1902.

2nd September 1902.

1. I. L. R., 24 M. 96.

4. I. L. R., 25 B. 337.

2. L. R., 6 I. A. 145.

5. I. L. R., 25 B. 179.

3. I. L. R., 23 M. 377.

decision of the Bombay High Court in *In re Pandurang Govind*¹. Upon the merits we think, upon the facts stated by the Acting District Magistrate, that he ought to have made the transfer. We accordingly direct that the case be transferred from the file of the 1st Class Sub-Divisional Magistrate of Tanjore Division to the file of the District Magistrate or to that of such other Magistrate as the District Magistrate may transfer it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore

Abboo Chetty and another Appellants.*

v.

Kuppusami Chetty Respondent.

Abboo Chetty *Criminal Procedure Code—Granting of sanction—Prima facie case—Reasonable chance of conviction.*

v.
Kuppusami
Chetty.

The granting of sanction under S. 195, cl. 3 of the Criminal Procedure Code, is not a mere formal matter, and before sanction can be granted, it is necessary for the Magistrate granting the sanction, to consider the evidence and decide as to whether there is a *prima facie* case and any reasonable chance of conviction being obtained.

Appeal under S. 15 of the Letters Patent from the order of Mr. Justice Benson, in Criminal Revision Case No. 85 of 1902 rejecting the petition presented by the appellants herein, and two others for revision of the order of the Presidency Magistrate, Black Town, Madras, passed on application No. 363 of 1902 and for revocation of the sanction granted by the said order to prosecute the petitioners for offences under Ss. 109 and 211 of the Indian Penal Code.

V. Krishnaswami Aiyar for appellants.

The Crown Prosecutor (John Adam) for the Crown.

V. Krishnaswami Aiyangar for respondent.

The Court made the following

ORDER:—We cannot uphold the sanction given by the Magistrate. The Magistrate is mistaken in supposing that a sanction given under S. 195, clause 3 of the Criminal Procedure Code, is a mere formal sanction and that it is not necessary for him before

¹ L. P. A. No. 19 of 1902.

30th April 1902.

1. I. L. R., 25 B. 179.

granting sanction to consider the evidence and decide as to whether there is a *prima facie* case and any reasonable chance of a conviction being obtained. In the present case, it is impossible to hold that there is a *prima facie* case. The only evidence of any importance which, as far as can be seen, would be available against the present appellants of having abetted Chinniah Naidu in bringing a false charge of theft would be the statements of Chinniah Naidu himself who it is shown after application had been made for sanction to prosecute him turned round and pleaded in a letter that all he had done was at the instigation of the present appellants. Since he wrote this letter although it is now almost four months after the date of the granting of sanction against him, no steps have been taken to try Chinniah Naidu. Under these circumstances with this sanction hanging over his head, it is certain that no Magistrate could attach any weight to any evidence that he might give. There is nothing to show that there is any other evidence available of any importance to prove that the appellants instigated the preferring of a false charge by Chinniah Naidu. As a court of appeal we set aside the sanction granted against Abboo Chetty and Raghavalu Chetty and as a court of revision the sanction to prosecute Mangadu Ellappa Chetty and Kuppusami Iyer.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Moore.

King Emperor Appellant.*

v.

Alexander Allan Accused.

Madras Municipal Act (IV of 1884), S. 63, sub-sec. 3—Agricultural Rates Act (59 and 60, Vic. Ch. 16), S. 19—Agricultural land exempt from taxation—Agricultural purposes, what are.

King Emperor
v.
Alexander
Allan.

Lands used for agricultural purposes are exempt from the enhanced rates of taxation that may be imposed by section 63, sub-section 3 of the Madras Municipal Act.

Lands on which potatoes, grains, vegetables, &c., are grown, and lands used for pasture are lands used for agricultural purposes.

The definitions in the Agricultural Rates Act (59 and 60, Vic. Ch. 16) S. 19 and in the Murray Dictionary of 'Agricultural Purpose' may be referred to in construing the same words in the Madras Municipal Act.

Appeal under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in

King Emperor v. Alexander Allan. Summary Case No. 848 of 1900 by the Bench of Magistrates, Ootacamund.

The Public Prosecutor for the Crown.

Barton for the Accused.

The Court made the following

ORDER :—This is an appeal preferred on behalf of Government from a judgment of the Bench of Magistrates in Ootacamund acquitting the defendant Mr. Allan who had been prosecuted by the Municipality under section 103 of the Madras Municipalities Act (IV of 1884 as amended by Act III of 1897).

The only question which has arisen for decision at the hearing of this appeal is as to whether all or any portion of the lands owned by Mr. Allan, the details as to which are given in Exhibit D, should be held to be lands used solely for agricultural purposes and as such exempted from the enhanced rates of taxation that may be imposed in certain cases under section 63, sub-section 3 of the Madras Municipalities Act.

The expression "agricultural" is not defined in the Act. The only decisions of this Court to which our attention has been drawn in which an attempt has been made to define the word "agricultural," are the case of *Kunhayen Haji v. Mayan*¹ where it was held that a lease of a coffee garden or a lease of certain coffee plants in a garden, for as to this the judgment is not very clear, is not an agricultural lease within the meaning of S. 117 of the Transfer of Property Act, and the judgment in *Murugesu Chetti v. Chinnathambi Goundan*² in which it has been decided that a lease of land for betel cultivation should be held to be an agricultural lease in so far as that section is concerned.

On referring to the Agricultural Rates Act (59 and 60 Vic. Ch. 16) passed in 1896 for the purpose of exempting the occupiers of agricultural lands in England from paying as high rates on such lands as those levied on buildings and other hereditaments, we observe (section 9) that "agricultural land" is there defined as follows :—"The expression "agricultural land" means any "land used as arable, meadow, or pasture ground only, cottage "gardens exceeding one quarter of an acre, market gardens, "nur-sery grounds, orchards, or allotments, but does not include a

1. I. L. R., 17 M. 98.

2. I. L. R., 24 M. 421.

“land occupied together with a house as a park, gardens, other
 “than as aforesaid, pleasure grounds, or any land kept or pre-
 “served mainly or exclusively for purposes of sport or recrea-
 “tion, or land used as a race-course.”

King
 Emperor
 v.
 Alexander
 Allan.

We also find that in the Oxford English Dictionary edited by Dr. J. A. H. Murray, which is admitted to be the standard authority in such matters, agriculture is defined as follows:—“The science
 “and art of cultivating the soil, including the allied pursuits of
 “gathering in the crops and rearing live stock; tillage, husbandry
 “farming (in the widest sense).”

We also note that it is there pointed out that the restriction of the word ‘agriculture’ to tillage, as in the following quotation, is rare. “The lands were not fields for agriculture but pasture for cattle.” We believe that we cannot do better than follow these definitions in attempting to decide what for the purposes of sub-section 3 of section 63 of the Municipalities Act are or are not lands used solely for agricultural purposes. Referring again to Exhibit D we have no hesitation in holding that lands on which potatoes, grain, vegetables, etc., are grown are lands used solely for agricultural purposes. We do not consider that any distinction can be drawn between large and small plots of lands on which roots or grain are cultivated. All such land must be held to be land used solely for agricultural purposes. We have next to consider the lands over 40 acres in extent entered in Exhibit D “as waste.” Mr. Barton on behalf of Mr. Allan has urged before us that these so-called waste lands are pasture lands and as such should be held to be lands used solely for agricultural purposes. Turning again to the definition of the word ‘agricultural’ which we have accepted, we find that agricultural lands include lands set apart as “pasture ground only” and also lands used for “rearing live stock.” If, therefore, it could be shown that these so-called waste lands were in reality pasture grounds or lands used for rearing live stock, we should certainly decide that they were lands used solely for agricultural purposes. We cannot, however, hold on the evidence on the record that it has been shown that they are so used. All that we can find in the papers sent up bearing on the question as to how these lands are used is the following statement of the defendant

King
Emperor
v.
Alexander
Allan.

Mr. Allan :—" Nos. 117, 118, 119 and 120 are in the occupation of Mrs. Reynolds; defendant receives no rent. Mrs. Reynolds pays the Government quit-rent; he uses it for grazing." If this is all the evidence that is forthcoming as to how the lands are used, we should most certainly hold that they are not "pasture grounds" or "lands used for rearing live stock." It is however urged by Mr. Barton that attention was not clearly drawn to this question when the case was before the Magistrates, and that if opportunity be given to his client he will be able to put forward fuller and clearer evidence as to how this waste land is really used. As it is most inadvisable that we should decide this question, which is one of some general importance, in a case in which all the evidence available as to the manner in which the lands are used is not on the record, we, under section 428 of the Criminal Procedure Code, send back the case to the Bench of Magistrates and direct them to take such further evidence as may be put forward by the Municipality and Mr. Allan as to the purposes for which the land shown in Exhibit D as waste is used, the fullest details possible being given, and to submit the same for the consideration of this Court.

On further evidence being taken and sent up, their Lordships (*Davies and Moore, JJ.*) delivered the following

JUDGMENT † :—The further evidence shows clearly that the 44 acres odd regarding which we had some doubt are pasture lands, and the learned Public Prosecutor does not dispute the fact. That being so, it follows from the views we have already expressed that the land is land used solely for agricultural purposes and is therefore exempt from taxation.

This appeal is therefore dismissed. Ordered accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Subbarami Reddi	...	...	Appellant*
			(1st Defendant).
v.			
Rajamannar Aiyangar	...	...	Respondent
			(Plaintiff).

* S. A. No. 433 of 1900.

6th February 1902.

† 18th October 1901.

Suit for winding up partnership—Reference to arbitration—Consent of all parties—Award—Appeal.

Subbarami Reddi.

v.

Rajamannar Aiyangar.

In a suit for winding up a partnership a reference to arbitration cannot be made by court except on the application or with the consent of all the parties (though some of them do not appear and remain unrepresented).

Where the reference to arbitration is illegal and there is an award, an appeal lies against the decree notwithstanding that it is in conformity with what purports to be the award.

Second appeal from the decree of the District Court of Nellore, in A. S. No. 533 of 1898, presented against the decree of the Court of the District Munsif of Nellore, dated 25th April 1898, in O. S. No. 14 of 1898.

The 1st defendant's uncle and 3rd defendant purchased the right of selling arrack in certain places from 1st April 1886 to 31st March 1887. The plaintiff and the 2nd defendant entered into a partnership with them with respect to this by a registered agreement dated 2nd March 1886. This suit was brought by the plaintiff on the 7th April 1893 for an account of the partnership business and for share of profits. The District Munsif held at first that the suit was barred. On appeal the District Judge reversed this decree and remanded the suit for disposal on the merits. The 3rd defendant died pending appeal and his widow, the 4th defendant was brought on the record as his legal representative. She did not appear. When the case came on after remand the parties other than the 4th defendant agreed to refer the matter for arbitration. The 4th defendant did not join in the reference. The arbitrator gave an award under which the 1st defendant was directed to pay a certain amount for his advance and for share of profits. Objections were taken to the award on the ground, among others, that it was bad as the reference was not made by all the parties admitted to be partners or their representatives. The District Munsif overruled the objection and passed a decree in accordance with the award. On appeal the District Judge confirmed this decree of the District Munsif. Hence this second appeal.

T. V. Seshagiri Aiyar for appellant.

C. Ramachandra Row Sahib for respondent.

Subbarami
Reddi.

v.

Rajamannar
Aiyangar.

The Court delivered the following

JUDGMENT :—The petition requesting the court to refer the matter to arbitration in a case for winding up of a partnership should not have been granted except on the application or with the consent of all the parties. Neither the 3rd defendant nor his representative was a party to the petition of the 11th September 1897. The reference to arbitration was illegal and, therefore, the award being void, there is an appeal against the decree notwithstanding that it is in conformity with what purports to be an award. The decrees of the Courts of the District Munsif and District Judge are set aside and the suit is sent back to the District Munsif for trial on the merits, everything done subsequent to the order of remand by the District Court being set aside as irregular. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Sinnu Pandaram Appellant* (*Assignee
Decree-holder*).

v.

Santhoji Row and others Respondents (*Plain-
tiff, Judgment-debtor
and 1st and 3rd
Defendants Decree-
holders*.)

Sinnu Pan-
daram.

v.

Santhoji Row

Civil Procedure Code, Ss. 233, 240—Cross-decrees—Notice of assignment.

Where there are cross-decrees in suits between the same parties, the decree for the smaller amount becomes incapable of execution under S. 240, C. P. C., and the decree for the larger amount less the decree for the smaller amount is alone capable of execution. The decree for the smaller amount was subject to the equities under S. 240.

S. 240 is applicable to a case where the cross-decrees are passed by the very court whose duty it is to execute them and neither has been transferred for execution to another court. *Reva Mahton v. Ramkishan Singh*¹, distinguished.

Where a decree is assigned, the assignment takes effect against the judgment-debtor only on notice to the latter and is accordingly subject to all equities arising prior to the date of such notice.

* A. A. No. 15 of 1902.

14th August 1902.

L. R. 18, I. A. 106.

Where, therefore, there was a decree against S, and the decree-holder assigned it to the appellant, but before the assignment was perfected by notice, S obtained a decree for a larger sum against appellant's assignor :—

Sinnu Par-
daram
v.
Santhoji Row.

Held, (1) that the appellant took the assignment subject to the equity attaching to the decree under S. 246, C. P. C., and

(2) that the appellant could not execute the decree assigned to him against S.

Appeal from the order of the District Court of Coimbatore, dated the 26th September 1901, on C. M. P. No. 275 of 1901 in E. P. No. 60 of 1900 in O. S. No. 39 of 1897.

P. S. Sivaswami Aiyar for appellant.

The respondent was not represented.

The Court delivered the following

JUDGMENT :—We are of opinion that the application for execution should have been dismissed absolutely. The transfer of the decree in O. S. No. 39 of 1897 to the appellant will take effect against the judgment-debtor (Santhoji) in respect of the cross decree which he obtained for a larger amount against the transferer in O. S. No. 7 of 1895 on the 3rd February 1900 only on some day subsequent to the 23rd October 1900, when alone he had notice of the assignment, it not being alleged that he had notice prior thereto. That being so, on 3rd February 1900 the decree for a smaller amount in O. S. No. 39 of 1897 became incapable of execution under the equitable principle enunciated in section 246, Civil Procedure Code, and at the date of the completion of the transfer by notice as against Santhoji, the decree in O. S. No. 22 of 1897 was subject to such equity and therefore under section 233 the appellant as assignee of the decree sought to be executed was subject to such equity.

In our opinion section 246 is not inapplicable to a case where the cross decrees are passed by the very court whose duty it is to execute them and neither has been transferred for execution to another court.

The decision in *Rewa Mahton v. Ram Kishen Singh*¹ does not militate against this view, the ground of the decision being that a sale made by granting execution in contravention of section 246 will not affect the title of a *bona fide* purchaser.

The appeal fails and is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Ramaraju	...	...	...	Appellant*
				(Plaintiff).
<i>v.</i>				
Ramalingam and others	...	...	...	Respondents
				(Defendants).

Ramaraju *Specific performance—Joint family—Contract to convey by manager—Other members not*
v. *liable for specific performance—Binding contract.*
 Ramalingam.

A contract to convey by the manager of a joint family cannot be specifically enforced against other members unless the latter were either parties to the contract or authorized the manager to enter into the contract or ratified the same.

In such a suit the question whether the sale will bind the other members under the Hindu Law does not arise.

Second Appeal from the decree of the Subordinate Judge's Court of Cocanada in referred A. S. No. 63 of 1900 presented against the decree of the Court of the District Munsif of Narasapur in O. S. No. 377 of 1899.

The plaintiff brought this suit against the three defendants, members of a joint Hindu family, for specific performance of a contract of sale of joint property entered into between the plaintiff and the 1st defendant as manager of the joint family. It was neither alleged nor proved that the 2nd and 3rd defendants were parties to the contract or that they authorised or ratified the contract. The District Munsif held that the contract was entered into by the manager for the benefit of the joint family and decreed specific performance against all the defendants. On appeal, the Sub-Judge reversed this decree and dismissed plaintiff's suit *in toto*. Hence this second appeal.

V. Ramasam for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The plaint alleges that the 1st defendant as managing member of the undivided family consisting of the three defendants entered into a contract to convey the lands mentioned in the plaint to the plaintiff and placed him in possession of the same after receiving 50 rupees in part payment of the price agreed. There is no allegation in the plaint that 2nd and 3rd defendants

were parties to the contract or that they authorized the 1st defendant to enter into the contract or that they ratified the same. The plaintiff, therefore, discloses no cause of action against 2nd and 3rd defendants for specific performance of the 1st defendant's contract. The suit against them should have been dismissed at the first hearing. But upon the findings the plaintiff is clearly entitled to a decree for specific performance against the 1st defendant without determining whether the sale by him would bind the interests of the 2nd and 3rd defendants in the property agreed to be sold. The Subordinate Judge's decree is modified to this extent and confirmed in other respects. The appellant will be entitled to recover his costs throughout from the 1st defendant and will pay the costs of 2nd and 3rd defendants throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Moore.

Viraraghava Perumalayya	...	...	Appellant*
	<i>v.</i>		(Defendant).
Sitaramayya	...	...	Respondent
			(Plaintiff).

Act XX of 1863, S. 16—*Religious endowment—Compulsory arbitration—Scheme.*

Under S. 16 of the Religious Endowment Act, the District Judge has no power to refer the whole suit for decision to an arbitrator, though the Judge may refer any matter in difference in the suit for decision by an arbitrator.

The District Judge cannot frame a scheme in a suit under S. 14 of the Act.

Appeal from the decree of the District Court of Kistna in O. S. No. 1 of 1899.

The plaintiff as a person interested in the worship of Seetharamasami temple in Buchayyapetta in Masulipatam obtained sanction under S. 18 of Act XX of 1863 and S. 539, C. P. C., for removal of the defendant from the Dharmakartaship on the ground of misappropriation and mismanagement of temple funds. He brought the suit under S. 14 of the Religious Endowment Act in the District Court, though in the plaint sanction under S. 539, C. P. C., is also mentioned as having been obtained by plaintiff. The Judge framed several issues, and under S. 16 of the Act referred them for decision by an arbitrator. The arbitrator found the defendant guilty of general mismanagement, but that the misconduct

* Appeal No. 197 of 1900.

25th July 1902.

Viraraghava
Perumalayya
v.
Sitaramayya.

on the part of the defendant was not such as to entail the dismissal of the defendant. But the arbitrator for purposes of proper management in future framed a scheme by way of adding two more trustees &c. The District Judge accepted the award and passed a decree in accordance with the same. Hence this appeal.

P. S. Sivaswami Aiyar for appellant.—The Judge has no power to refer the whole suit for decision by the arbitrator, S. 16. Even the Judge has no power to frame a scheme in a suit under the Act; much less the arbitrator.

V. Krishnaswamy Aiyar (with *K. Subramania Sastri*) for respondents.—The passing of the scheme may be outside the scope of the Act. That may be struck out. But the reference of the whole suit is valid. See *R. Perumal Naick v. Saminatha Pillai*¹ (*Davies, J.*:—It is the decision of a single Judge). This decision was upheld by a bench of two Judges in a recent unreported case. See *Nambi v. Yajnanarayana*². There is nothing illegal in referring all the issues in a suit and therefore so much of the award as is within the scope of the suit and the powers of the arbitrator may be upheld.

The Court delivered the following

JUDGMENT:—Under section 16 of the Religious Endowment Act XX of 1863, it was open to the Judge to refer any matter in difference in the suit for decision by an arbitrator, but it was not open to him to refer the whole suit for decision to an arbitrator as he has done in this case.

One result of this irregularity has been that the arbitrator has drawn up a scheme for the management of the temple which not even the District Judge had the power to do under the Act.

On this ground we allow the appeal, and reversing the decree, remand the suit to be replaced on the file and disposed of according to law.

Costs of the appeal to abide and follow the result. The memorandum of objections is dismissed without costs.

1. I. L. R., 19 M. 498.

2. 12 M. L. J. 43.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present;—Mr. Justice Benson and Mr. Justice Boddam.

Annasamy Aiyar and others Petitioners.*

v.

Mahadeva Sastry Counter-Petitioner (Complainant).

Penal Code—Unlawful assembly—Rioting—Accused in possession—Forcible removal—Resistance. Annasamy AiyarWhere the accused were in possession of a receptacle containing paddy contributions and the complainant endeavoured with his servants to remove the paddy forcibly but was met with resistance by the accused:—
v. Mahadeva Sastry.*Held*, that the accused were justified in resisting the attempt to take possession and in maintaining possession and were guilty of no offence.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the 1st Class Sub-divisional Magistrate of Tanjore Division in Calendar Case No. 8 of 1900.

There was a Mahajana Sabha in the village of Sulamangalam, in Tanjore District. The complainant was, alleged to be the treasurer of the Sabha. The 1st accused was the biggest landlord in the village and was once a leading active member of the Sabha. Differences arose and he resigned. A series of resolutions were passed against him by the Sabha, and it was at last resolved on 19th August 1899 to remove him from the office of Kavalgar for not executing a muchilika in time. The 1st accused took possession of the receptacle wherein paddy contributions paid to the Sabha by the villagers were stored and appointed the 7th accused as his own watchman. On 29th October 1899 complainant with his servant went to remove the paddy from the receptacle, but he was obstructed by the 7th accused and withdrew. He then gave notice to the 1st accused and called a meeting of the Sabha on 4th November. The meeting resolved that the complainant should endeavour to recover possession peaceably and if resistance should be met with, resort should be had to the Civil Court for redress. The complainant with some others went on the 5th November to open the receptacle but he was resisted, and the 1st accused and his men forcibly carried away the paddy from the receptacle out of the reach of the com-

* C. R. C. Nos. 168 and 113 of 1901,

10th September, 1901.

Annasamy
Aiyar
v.
Mahadeva
Sastry.

plainant. The accused were charged with the offences of unlawful assembly, rioting, theft, hurt, &c., under secs. 143, 147, 379, 323, &c. The 1st class Sub-divisional Magistrate convicted all the accused.

Those against whom appealable sentences were passed appealed to the Sessions Judge, and he held that no offence was at all committed; that the 1st accused was justified in maintaining his possession and that the conviction of the magistrate must be quashed and the sentence set aside. Those against whom non-appealable sentences were passed put in a petition to the Sessions Judge to report the matter for the orders of the High Court, but the Sessions Judge directed that petitions should be put in direct to the High Court. Hence these revision petitions to the High Court.

D. Chamier for petitioners.

The Public Prosecutor in support of the conviction.

T. Natesa Aiyar for *R. Sivarama Aiyar* for counter-petitioner.

The Court made the following

ORDER:—The first Class Sub-divisional Magistrate found that the petitioners all acted in accordance with the directions of the 1st accused. He found that before and at the time of the alleged offences the 1st accused was in possession of the receptacle containing the paddy contributions, and had appointed his own watchmen, two of whom are amongst the petitioners, and that the complainant had sent a notice to the 1st accused whereby he acknowledged the 1st accused's possession and stated that he would be held responsible for all damage. The Sabha only authorized the complainant to endeavour to remove the paddy peaceably, and if he met with any resistance directed him to resort to a Civil Court. The complainant endeavoured to take possession of the paddy forcibly with his servants, and the acts complained of were done by the 1st accused and the petitioners in resisting this attempt to take possession and in maintaining the possession of the 1st accused.

In the circumstances, no offence was committed and the petitioners and the 1st accused should have been acquitted.

We set aside the convictions and acquit and discharge all the petitioners.

The fines, if paid, will be refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashayam Aiyangar and Mr. Justice Moore.

Kunhunha Umma ... Appellant *
(2nd Defendant).

v.

Valoth Assenar and others ... Respondents
(Plaintiff and 1st
and 3rd Defendants).

Civil Procedure Code, S. 411—Stamp fees payable to and recoverable by Government—Kunhunha
Subject-matter—First charge. Umma

The amount due to Government as stamp fees and recoverable by Government Valoth
upon the success of the pauper plaintiff in the suit is a first charge upon the subject- Assenar.
matter of the suit under S. 411, C. P. C., and a purchaser of the property forming
a portion of the subject-matter of the suit at a sale held for realizing the amount
due to Government will get a free title as against a subsequent purchaser of the
same property in execution of the decree obtained against the pauper or his estate
for debts due by him.

Second appeal from the decree of the District Court of
North Malabar in A. S. No. 288 of 1900 presented against the
decree of the Court of the District Munsif of Tellicherry in
O. S. No. 389 of 1899.

The plaint properties originally belonged to Jaffer Ali Sahib.
After his death one of his widows and his children by her brought a
suit in *forma pauperis* for partition of his estate against the other
widow and some others. The plaintiff obtained a decree and were
directed to pay the court fee payable to Government. In execu-
tion taken out by Government, the plaint property was sold on
11th June 1896 and purchased by plaintiff who was subsequently
placed in possession, while this suit for partition was pending.
A creditor of Jaffer Ali Sahib brought a suit for the recovery
of the money due to him in the Original Side of the High Court
against the other widow of Jaffer Ali Sahib, the defendant in the
partition suit. He obtained a decree and the plaint property
was attached on 14th February 1899 through the District Court of
North Malabar. Plaintiff put in his claim, but this was disallowed.
Hence this suit by the plaintiff for a declaration that the property
was not liable to be sold in execution of the decree of the High

Kunhumba
Umma
v.
Valoth
Assenar.

Court, Original Side. The District Munsif dismissed the suit, and on appeal the District Judge reversed it and gave plaintiff a decree. Hence this second appeal.

C. Sankaran Nair for appellant.

J. L. Rosario for respondent.

The Court delivered the following

JUDGMENT :—It appears that the property was purchased by the plaintiff at a sale held in order to recover the amount due to Government as stamp fees in O. S. No. 26 of 1892. The property now in question was a portion of its subject-matter. Such being the case, the sum recoverable by Government was a first charge on the property under S. 411 of the Civil Procedure Code. The 2nd defendant was a subsequent purchaser of the same property in execution of a decree which he obtained against the estate of the deceased for debts due by him. The Crown having a first charge on the property, the plaintiff's purchase prevails as against that relied on by the 2nd defendant. On this ground, we confirm the decision of the District Judge and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Chalaban Tholan and another ... Petitioners *(*Defts.*)

v.

Kunhambu ... Respondent (*Plaintiff*).

Civil Procedure Code, S. 43—Landlord and tenant—Shells dug up by tenant—Property in shells—Wrongful conversion.

Chalaban

Tholan

v.

Kunhambu.

An agricultural tenant is not entitled to the shells dug up by him out of the earth in the absence of a local custom. The property in such shells is in the landlord and not in the tenant.

*Tucker v. Linger*¹, and *Elues v. Briggs Gas Company*², followed.

Quaere :—Whether the tenant will be justified in digging up shells in cultivating the land properly and in a husbandman—like manner.

Where the landlord filed a suit for injunction against the tenants restraining the latter from digging up and removing shells and the tenants subsequently to such suit removed the shells from their holding where they were stored up and converted them to their own use—

* C. E. P. 230 of 1900.

3rd February 1902.

1. L. R. 8 A. 6508.

2. 33 Ch. D. 562.

Held, in a subsequent suit by the landlord against the tenant for such wrongful conversion, that S. 43, C. P. C., was no bar to the suit.

Chalaban
Tholan
v.
Kunhambu.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Tellicherry in S. C. Suit No. 250 of 1900.

V. Ryru Nambiar for appellant.

J. L. Rosario for respondent.

The Court delivered the following

JUDGMENT :—The petitioners are agricultural tenants of some lands for paddy cultivation and the respondent is a subsequent lessee under the landlord of the right to dig up and take shells from the holding without causing any detriment to the use of the land for agricultural purposes by the tenants. It is found that the agricultural tenants dug up a large quantity of shells and converted them to their own use. But they have not alleged or proved any local custom entitling them to do so. (*Tucker v. Linger*¹). Whether the tenant was or was not justified in digging up shells for cultivating the land properly and in a husband-like manner, the property in the shells is not in him but in the landlord or rather the plaintiff-respondent, the assignee of the landlord (*Tucker v. Linger*¹; *Elwes v. Briggs Gas Company*²). In the absence of a local custom, the defendants had not a right to convert the shells which they dug up to their own use. Section 43, Civil Procedure Code, is, in our opinion, no bar to any portion of the claim made in this suit, for it is admitted that even such portion was on the holding where it was stored up at the date of the former suit for injunction, but was removed and converted by the defendants to their own use only subsequent to the former suit.

The revision petition, therefore, fails and is dismissed with costs.

1. L. R., 8 A. C. 508.

2. 83 Ch. D. 562.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies, Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Chakrapani Aiyangar *Appellant.**

v.

The King Emperor *Respondent.*

Chakrapani
Aiyangar

v.

The King
Emperor.

Criminal Procedure Code, S. 195—Letters Patent, S. 15—Sanction—Judgment—Criminal trial—Probability of conviction.

An order passed under S. 195 of the Code of Criminal Procedure is not a sentence or order 'in a criminal trial' and is, therefore, appealable under S. 15 of the Letters Patent.

Where there is no probability of conviction if sanction be given, the court ought to refuse sanction.

Appeal under section 15 of the Letters Patent from the order of Mr. Justice Benson, dated 27th March 1902, in Cr. R. Case No. 154 of 1902, confirming the order of the Sessions Judge of the Tanjore Division in Cr. M. P. No. 6 of 1902, sanctioning the prosecution of the appellant herein for an offence under S. 193, Indian Penal Code.

V. Krishnaswami Aiyar and P. R. Sundara Aiyar for appellant.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—We consider that this appeal lies under S. 15 of the Letters Patent, as it is impossible to hold that an order passed under S. 195 of the Code of Criminal Procedure with a view to a subsequent prosecution and trial for an offence is a sentence or order passed "in a criminal trial." We, therefore, proceed to hear the appeal.

On the merits we consider that the sanction granted by the Sessions Judge ought to be revoked, as there is no evidence to prove the falsity of the appellant's statements except that of Srinivasaraghavachari, whose evidence was treated as untrustworthy by the Bench which heard the Referred Trial No. 72 of 1901, the members of which are also on this Bench. The Sessions Judge is in error in supposing that the evidence of the Village Magistrate contradicts that of the appellant. The appellant's statement is made with reference to a different occasion from that to which the

Village Magistrate speaks, and, therefore, they are not contradictory of each other. Srinivasaraghavachari may have made different statements to these persons on the two different occasions. There is, therefore, no probability of securing the appellant's conviction even if sanction is granted, and we, therefore, set aside the sanction accorded by the Sessions Judge.

Chakrapani
Aiyangar
v.
The King
Emperor.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Meiyallu Nadan Appellant*
(Plaintiff).

v.

Anjalay and another Respondents
(Defendants).

Registration—Gift—Death of donor—Registration by legal representative.

Meiyallu
Nadan
v.

The voluntary registration of a deed of gift by the legal representative of the deceased donor is valid and passes title to the donee. It has the same effect as the voluntary registration effected by the donor in his lifetime.

Second appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 695 of 1899, presented against the decree of the Court of the District Munsif of Tiruturai-pundi in O. S. No. 75 of 1899.

Plaintiff obtained a money decree against 1st defendant in S. C. No. 1080 of 1896 and attached the plaint property as belonging to her in right of her husband. The 2nd defendant put in a claim on the ground that her father, the 1st defendant's husband, made a gift of it under a registered deed, dated 22nd December 1884, and her claim was allowed. The plaintiff brought this suit under Sec. 283, C. P. C., for enforcing his attachment, and his short point was that the gift was invalid being incomplete, as before it could be registered the donor died and the registration by the donor's widow the 1st defendant after her husband's death did not validate the document. The Munsif gave a decree for the plaintiff, but the Sub-judge reversed it and dismissed plaintiff's suit. Hence this 2nd appeal.

* S. A. No. 1183 of 1900.

Meiyallu
Nadan
v.
Anjalay.

A. T. Ambrose for appellant.

V. Krishnaswami Aiyar for 2nd respondent.

The Court delivered the following

JUDGMENT:—The voluntary registration of the deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life-time. There was, therefore, a valid gift to the 2nd defendant.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Balakrishtnamma Subudhi ... Appellants*
(Plaintiff).

v.

Vinayaka Rama Singi and others ... Respondents
(Defendants).

Balakrisht-
namma
Subudhi
v.
Vinayaka
Rama Singi.

Usufructuary mortgagee—Unregistered instrument—Long possession as mortgagee—Acquisition by adverse title—Registration Act, SS. 50 and 80.

A person who is in possession for more than 12 years as an usufructuary mortgagee under an unregistered instrument gets a valid title by adverse possession as such usufructuary mortgagee and could not be ejected on the ground that he could not prove the mortgage. *Nallamuthu Pillai v. Betha Naiken* referred to.

Second appeal against the decree of the District Court of Ganjam in A. S. No. 65 of 1900 presented against the decree of the Court of the District Munsif of Berhampore in O. S. No. 149 of 1898.

The plaint property admittedly belonged originally to 1st defendant and his brother. They mortgaged with possession this property to 2nd defendant in 1877, and according to the 2nd defendant's case subsequently sold it orally being unable to clear the mortgage. The 1st defendant and his brother then mortgaged it to the plaintiff who sued them in O. S. 82 of 1894 upon the mortgage, and after obtaining a mortgage decree brought the mortgaged property to sale in execution of the same and purchased it himself on 18th December 1895. The plaintiff now brought this suit against the defendant, alleging that the 2nd defendant trespassed upon

* S. A. No. 1158 of 1900.

3rd March 1902.

on the land in 1896. The recent trespass was found against by both court. They also found that the 2nd defendant was in possession as usufructuary mortgagee since 1877 and that the oral sale which was prior to plaintiff's mortgage was true and valid. Both courts dismissed plaintiff's suit, Hence this 2nd appeal.

V. Krishnaswamy Iyer for appellant.

P. R. Sundara Iyer for respondents.

The Court delivered the following

JUDGMENT :—It is not necessary to consider the effect of section 50 of the Registration Act in this case, as we find that the second defendant has been in possession as usufructuary mortgagee, although under an unregistered instrument, since 1877, and there is nothing in section 50 of the Registration Act to affect the operation of the Law of Limitation in favour of a person who claims under an unregistered document (*vide Nallamuthu Pillai v. Betha Naicken*)¹. The fact that the second defendant has been latterly for some years claiming under an invalid sale does not make his possession the less adverse to the plaintiff. This second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*, and Mr. Justice Benson.

Moidin Kutty

Appellant*

(2nd Defendant).

v.

Kunhi Kutty Aly

Respondent

(Plaintiff).

Civil Procedure Code, S. 283—Claim—Judgment-debtor—Notice—Party to order.

An order under S. 283, C. P. C., passed on a claim petition under S. 278, C. P. C., does not necessarily bind the judgment-debtor unless notice is given to the debtor. If he is not a party to such order he is not bound by the rule of one year's limitation prescribed under Art. 12 of the Limitation Act.

*Netteton P. Damodren Nambudry v. Tayambary Parameshwaram Nambudry*² doubted.

*Sardhari Lal v. Ambika Pershad*³ referred to.

Second appeal from the decree of the District Court of North Malabar in Appeal Suit No. 186 of 1900 presented against the

* S. A. No. 1017 of 1900.

21st January 1902

1. I. L. R. 23, M. 37. 2. 4 M. H. C. R., 472. 3. L. R., 16 I. A. 123.

Moidin Kutti v. Kunhi Katty Ali. decree of the Court of the District Munsif of Cannanore in O. S. No. 337 of 1899.

Plaintiff and 2nd defendant were joint owners. The plaintiff alleged that he leased the plaint land to the 1st defendant to make a new pit, that the 1st defendant made a pit and assigned his interest to 2nd defendant, and that plaintiff leased it to 3rd defendant and demanded surrender of 2nd defendant but the latter refused. Plaintiff therefore brought this suit for ejecting the 1st and 2nd defendants. The defence was, among others, that the plaintiff owed 3rd party a debt and the latter obtained a decree and attached the plaint property, that the 2nd defendant put in a claim for joint ownership, and that an order was passed in his favor and that this order under S. 283 barred the suit which was brought more than a year after the date of such order. The plaintiff was apparently given no notice of the claim but it was alleged that he paid the money due to the attaching creditor and settled the matter and did not oppose the claim. Both courts gave plaintiff a decree. Hence the second appeal.

J. L. Rosario for appellant.

C. Sankaran Nair for respondent.

The Court delivered the following

JUDGMENT:—Having regard to the terms of the order made in the claim proceedings and to the fact that it was not proved that the plaintiff actually received notice of the claim proceedings, we are of opinion that the plaintiff is not a party against whom an order has been made within the meaning of S. 283, Code of Civil Procedure, and that the order is not conclusive as against him. We do not think the decision of the Full Bench in *Natietom P. Damodrem Nambudry v. T'ayanbarry Parameshwaren Nambudry*¹ precludes us from adopting this view. Moreover, it seems doubtful whether, having regard to the observations made in the judgment of the Privy Council in the case of *Sardhari Lal v. Ambika Pershad*², this decision is good law. The Bombay and Calcutta High Courts* have adopted a different view from that

1. 4 M. H. C. 472.

2. 15 I. A. 123.

* See, however *Surnamoyi Dasi v. Ashutosh Goswami*, I. L. R., 27 O. 714.

taken by the Full Bench in the case referred to. See *Shivapa v. Moidin Kutti*
*Dod Nagaya*¹ and *Kedar Nath Chatterjee v. Rakhal Das Chatterjee*.² Kunhi Kutty
 Ali.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*, Mr.
 Justice Benson and Mr. Justice Moore

Beauchamp Appellant*
 (1st accused).

v.

Sir George Moore Complainant.

Criminal Procedure Code, S. 198—Defamation—Person aggrieved—Statement against Beauchamp
subordinate officers—Superior officer, how aggrieved. v.
 Sir George
 Moore.

The President of a Municipality is not a 'person aggrieved,' by the defamation of his subordinate officers within the meaning of S. 198, Criminal Procedure Code. Statements of specific acts of negligence on the part of the Health-officer and the Subordinate officers of the Health Department are not defamatory of the complainant the President of the Municipality, merely because he has a control over the Health department.

Appeal from the sentence of the Court of the Chief Presidency Magistrate, Egmore, Madras, in Calendar Case No. 34409 of 1901.

The *Advocate-General* (J. E. P. Wallis) instructed by Branson and Branson for appellant.

E. Norton, instructed by Barclay, Orr, David and Brightwell for complainant.

The Court delivered the following

JUDGMENT:—This is an appeal from a conviction of the Editor of the *Madras Mail* on a charge of defamation. The complainant is the President of the Madras Municipality. The charge alleges that the defendant published certain untrue and defamatory statements concerning the acting Health Officer of the Municipality and the subordinate officers of the Municipal Health Department, for whose efficient working the complainant is directly responsible, intending thereby, or knowing, or having reason to believe, the publication of such untrue and defamatory imputations would injure the reputation of the complainant.

1. I. L. R., 11 B 114.

2. I. L. R., 15 C. 274.

Beauchamp
v.
Sir George
Moore.

The charge then proceeds to set out the alleged untrue and defamatory imputations. They are as follows:—"That on Friday night (meaning the night of Friday, August 23, 1901) there were three attacks in two native houses in Chintadripet in Singanna Chetty Street. In one of the houses both the cases proved fatal. * * * There was one more attack in that very house and a Eurasian resident reported the case to the Police who, in turn, brought the Sanitary Overseer to the houses, but, strange to say, absolutely nothing was done in the way of disinfection, cleaning the clothes, &c., Naturally, the contagion spread to the neighbouring Eurasian houses, and the medical attendant at once reported the cases to the Health Officer; but, would you believe it, that only at 10 o'clock at night did the same overseer come to disinfect the houses * * *. It was pointed out to the Health Officer that the people had locked up the clothes of the patients in an adjoining house, and the clothes were found locked up. But beyond ordering the peons or the overseer to see them burned, nothing was done to destroy them. The corpse was allowed to be kept till at 7 last night * * * it was removed. When death occurs in a respectable Eurasian house the Municipal Health department insist on the body being removed at once, but the body of the woman was allowed to remain for one full day. This is not all. There was one death in the barracks and there are one or two cases of "diarrhoea" there. But the Municipality has done nothing to disinfect the house, and there are not fewer than a dozen families in the barracks. There are not fewer than three cases to-day, but, of course, we see not a single peon anywhere. These are facts which speak for themselves. I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures to put an end to the scourge * * * now carrying off men like sheep."

Further on the 5th day of September 1901, at Madras afore-said, in another number of the same paper, the *Madras Mail*, the said defamatory and untrue imputations and matter or portions thereof were repeated and confirmed in the following words, that is to say, "with reference to the above I have to state that the best evidence of the facts furnished by me is the above letter itself so far as the disinfection of the native house in Singanna Chetty Street is concerned." "Let me again restate my facts of the

case. *** On Friday, the 23rd ultimo, there were three attacks in two native houses in Singanna Chetty Street, in Chintadripet. It is also absolutely true that the Sanitary Overseer of the division visited the house on Saturday morning, but nothing was done as to disinfection till 10 p. m. on Saturday night. As to the removal of the corpse there is nothing in what I said to imply that I accused the Health Department of not carrying out the law in the matter. What I meant and what my words clearly indicate was that the Eurasians, the better class, were amenable to moral persuasions in this respect and removed their corpses without much delay. With regard to the disinfection of the clothes of the deceased, I regret to have to add ***. I have evidence to show they were not disinfected in the presence of the acting Health Officer, but only on his instructions *** after he left the spot."

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Moore.

The question we have to determine before it becomes necessary to go into the evidence is this; assuming the statements of which the complainant complains are untrue, and assuming for the purposes of the question now before us those statements are defamatory of the acting Health Officer, and of the subordinate officers of the Municipal Health Department, are the statements, in law, defamatory of the complainant?

None of the statements contains any express allegation that the complainant has been negligent in the discharge of his public duties. In our judgment the statements set out in the charge are not of such a nature as to suggest that the complainant has been guilty of negligence in the discharge of his public duties. The statements complained of are, in the main, allegations of specific acts of negligence by the acting Health Officer and the subordinate officers of the Health Department. It seems to us that none of the statements is capable of being construed as containing any imputation, as against the complainant.

Besides the specific allegations, there are two statements which may be described as general, one is "when death occurs in a respectable Eurasian house, the Municipal Health Department insist on the body being removed at once, but the body of the woman (the woman being a native) was allowed to remain for one full day."

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It was contended on behalf of the prosecution that these words are defamatory, inasmuch as they suggest that the Health Department are in the habit of bringing more pressure to bear in connection with the removal of corpses, when the corpse is that of an Eurasian than when it is that of a native. It seems difficult to extract any defamatory meaning from this statement; but assuming as, for the purposes of the question of the law, we do assume, that these words are defamatory of the Health Officer, it seems clear to us that they are incapable of bearing an interpretation which makes them defamatory of the complainant. The other general statement is, "There are not fewer than three cases to-day, but of course we see not a single peon anywhere." It is very difficult to see that these words involve any imputation on the complainant, but if there is any imputation, it is of so remote and slight a character that we have no hesitation in holding that the imputation was not made with the intention of injuring the reputation of the complainant or with the knowledge that it would do so.

This is clear from the concluding words of the letter complained of:—"I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures." This clearly indicates that the writer believed that the fault lay with the Health Officer and his subordinates, and that it was only necessary to bring the matter to the notice of the complainant in order to have more rigorous measures adopted. These words suggest confidence in the complainant rather than any negligence or inefficiency on his part. In our judgment the complainant is not a "person aggrieved" by the defamation of his subordinate officers (if they were defamed) within the meaning of those words as used in section 198 of the Code of Criminal Procedure.

The statements set forth in the charge and which are relied upon by the complainant as constituting the alleged defamation are, in our judgment, clearly not defamatory of the complainant.

The conviction is bad and must be set aside. The fine, if levied, must be refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. Sappani Asari

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore. ^{v.} Collector of Coimbatore.

Sappani Asari ... Appellant*
(Plaintiff).

v.

(1). The Collector of Coimbatore for the
Secretary of State for India in Council ... Respondents

(2). Krishnasawmy Asari ... (2nd and 1st
Defendants.)

Darkhast Rules—Regulation VI of 1803, S. 9 and Regulation VII of 1828, S. 3—
Executive Act—Delegation of power—Scope of authority—Rules prescribing only
procedure—Appeal to superior officer—Validity of grant consultation of Muni-
cipal Council—Grant vitiated by fraud, &c.—Appeal to Divisional Officer—Col-
lector's order on appeal—Fiction of law

Per Moore, J.—Under para 9 of the Standing Order of the Board of Revenue, No. 470, dated 15th August 1893, in case of applications for house-sites within Muni-
cipal limits, the Municipality concerned must be consulted before the applications
are considered.

This rule is not a mere idle formality though it may be open to the Tahsildar
(the officer concerned in granting applications for house-site) to accept or reject the
opinion given by the Municipal Council. A non-compliance with this rule is a fatal
defect in the title of the grantee.

It is open to a Collector to set aside the order of the Tahsildar, his subordinate,
on the ground of grave irregularity in not complying with this rule. There is no
question of a Civil Court setting aside the order.

Periya Rayalu v. Rayalu Reddi, distinguished.

Semble :—Under the general powers of supervision given to a Collector under
Regulation VI of 1803, sec. 9 and Regulation VII of 1828, S. 3, there is an appeal to
such Collector against the order of a Tahsildar granting an application for house-site
and it is open to the Collector to set aside such order if irregular.

Though the power of granting lands for house-sites might have been delegated
by the Governor-in-Council to the Tahsildar, yet as the exercise of this power was at
the same time subject to certain rules, a grant of house-site by the Tahsildar in viola-
tion of the rules is irregular and liable to be cancelled by the Collector, his official
superior in all other respects.

Where an appeal was provided from the order of the Tahsildar under the
Darkhast Rules to the Divisional Officer and the appeal was presented to the
Sub-Collector, the Divisional Officer, but the latter officer asked the Collector
for instructions upon the matter and on the Collector passing an order on such
letter of reference that the Tahsildar's order should be set aside, the Sub-Collector
issued a Takid to the Tahsildar cancelling the latter's order :—

*S. A. No. 1221 of 1900.

25th April 1902.

I. L. R., 18 M. 434.

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Held :—That the order was substantially that of the Divisional Officer within the meaning of the rule as to appeals and that there was no irregularity on the part of the Divisional Officer in making a reference to the Collector and getting his instructions.

Per Bhashyam Aiyangar, J. :— A power conferred by the Governor-in-Council on Tahsildars or Divisional Officers in regard to the disposal of Crown lands cannot be controlled by the Collector under Regulation II of 1803. S. 9. or under Regulation VII of 1828.

It is open to the Governor-in-Council by an executive act to subject the exercise of a power conferred by an executive act to the control of a superior authority, but in the absence of any such provision, a grant made by the Tahsildar is final and the Collector acts *ultra vires* in entertaining an appeal from the Tahsildar's order and in revoking the grant he has made.

Where the Tahsildar acts in excess of his authority in making the grant, the grant of course will not bind the Crown.

A distinction must be drawn between so much of the rules as are in the nature of a power of attorney defining the scope of authority and so much as are in the nature of instructions to such officers while exercising the power conferred upon them.

A rule which has the effect of delegating the power of the Governor-in-Council solely to the Tahsildar and enjoins the latter that in acting within the scope of his authority, he should consult the Municipal Council and either adopt or reject its advice is one relating to the procedure to be adopted by the agent and therefore a grant made by the Tahsildar without consulting the Municipal Council is nevertheless valid as being within the scope of the agent's authority.

But if the rule should provide that no grant should be made by the Tahsildar without the previous sanction of the Municipality would amount to a delegation by the Government not to one officer but to him jointly with another body. *Periya Royalu v. Royalu Reddi*, followed.

If the grant is vitiated by fraud, misrepresentation, collusion or mistake it does not bind the Crown.

An appeal allowed from the order of a Tahsildar to a Divisional Officer is not in the nature of a judicial appeal, and such Divisional Officer may consult and seek the advice of the Collector or of any other person and may be implicitly guided by such advice. But where the Collector issues his order, such order cannot be construed as that of the Divisional Officer and cannot be construed as a mere advice especially in a case where on the faith of a grant made by a public servant in the discharge of his duty, persons have incurred labour and expense and made considerable improvements.

A fiction of law may be resorted to when calculated to further the ends of substantial justice and not otherwise.

Second Appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 225 of 1898, presented against the decree of the Court of the District Munsif of Erode in O. S. No. 906 of 1897.

The court delivered the following

P. R. Sundara Aiyar for appellant.

Acting Government Pleader for respondent.

Sappani Atari.

v.

Collector of
Coimbatore.

JUDGMENT :—Moore, J :—When the first title deed granted *Moore, J.*

to the first defendant for the land to which this suit relates was issued by the Tahsildar (Exhibit T dated 8th September 1893), the rules in force with respect to the grant of house-sites were those embodied in the Proceedings of the Board of Revenue, No. 470, of the 15th August 1893. Under paragraph 9 of the standing order then in force, it was directed that when applications were received for house-sites within Municipal limits, the Municipality concerned should invariably be consulted before the applications were considered. The land in the present case is situated within the Erode Municipal limits and the Municipality was not consulted. The grant by the Tahsildar was therefore, in my opinion, rightly set aside as having been granted in violation of the orders then in force.

It is urged that although the rules no doubt directed the Tahsildar to consult the Municipal Council before making the grant, yet that it was open to him either to adopt or reject the opinion of the Council and that the grant made by him could not be held to be invalid, merely because he neglected to follow strictly the procedure laid down in the rules. In support of this contention the decision in *Periya Royalu v. Royalu Reddi*, is relied on. It is no doubt the case that it was open to the Tahsildar to accept or reject the opinion given by the Municipal Council as to the advisability of making the grant, but this does not make the rule requiring him to consult the Municipal Council an idle formality. The object of the rule no doubt was to give the Municipal Council an opportunity, if it objected to the grant, of representing the matter to the Collector or Divisional officer and staying the hands of the Tahsildar till the matter could be fully enquired into.

I am further of opinion that the decision reported at I. L. R., 18 Mad. 434, has no bearing on the question now under discussion. All that was there held was that it was not competent to the Civil Courts to set aside a grant made by a competent officer under the Darkhast rules merely because certain of the formalities prescribed by those rules have not been observed. Here there is no question of a Civil Court setting aside a grant because of irregularity in the

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Moore, J.

procedure but of a Collector setting aside an order of his subordinate on the ground that he had committed a grave irregularity. No doubt as to the legality of such action seems to have been entertained by the learned Judges who passed this decision, for they observe "Dharkhast rules are departmental and if they are infringed the remedy is also departmental." It is further urged that as under the terms of the standing order then in force no provision was made for an appeal from the order of the Tahsildar, the Collector acted *ultra vires* in setting that order aside. I should be inclined to hold that the general powers of supervision over all his subordinates in the Revenue Department given to a Collector by section 9, Regulation VI of 1803 and section 3, Regulation VII of 1828 empowered him to set aside the irregular order of the Tahsildar in the present case. Even, however, if it should be held that the provisions of these regulations cannot be deemed to govern the present case, I am decidedly of opinion that the action of the Collector was not *ultra vires*. The power of granting lands in village sites has been delegated by the Governor in Council to the Tahsildar, but certain rules have been laid down in accordance with which the powers given to him are to be exercised. If he, in direct violation of one of these rules, makes a grant, it must be held that he, in doing so, does not act within the scope of the authority given to him and that the grant irregularly made by him is therefore liable to be cancelled by the Collector his official superior, to whom he is subordinate in every official act performed by him as Tahsildar. Such it may, I consider, safely be assumed must have been the intention of the Governor in Council when these rules were sanctioned, notwithstanding that there is no explicit provision in them for an appeal from the Tahsildar's order.

The Tahsildar issued a second title-deed (Exhibit F) for this land to the 1st defendant on the 9th April 1895. The grant of the land by him was, however, set aside by the Collector on the 11th December 1895 (Exhibit VII). In his order the Collector states that he sets aside the grant as it was obtained fraudulently, but the District Judge is, no doubt, right in holding (paragraph 4 of his judgment) that what was really meant was that the 1st defendant was not a *bona fide* applicant in the sense that that term is used in the standing order, inasmuch as he was not an applicant who wanted the site in order to build a house on it in which he intended

to reside. That he was not such an applicant is clearly shown by the District Judge. Any doubt that then might be as to the Collector's right to set aside the grant under Exhibit D was removed before the date of Exhibit F by the proceedings of the Board of Revenue of the 1st February 1894, under which it was directed, with the approval of Government, that the standing order should be modified and that an appeal should be from the Tahsildar's order to the Divisional Officer. It is urged that in the present case the appeal from the Tahsildar's order was irregularly disposed of inasmuch as it was adjudicated on not by the Divisional Officer, the Sub-Collector, but by the Collector. What it appears took place was as follows:—An appeal (Exhibit IV) was presented to the Sub-Collector from Tahsildar's order. The Sub-Collector instead of disposing of this appeal himself made a reference regarding it to the Collector; his reason for doing so being no doubt that the previous order with respect to the grant of this site had been passed by the Collector. The Collector on receipt of the Sub-Collector's letter passed an order (Exhibit VII) in which he stated that the grant of the land should be cancelled. This order was communicated to the Sub-Collector who in due course issued a takid or order to the Tahsildar cancelling the grant and issuing further instructions to him in the matter. I do not consider that there was anything irregular or improper on the part of the Sub-Collector in asking the Collector for his instructions before he disposed of the appeal that had been preferred to him. The final order passed by the Sub-Collector and issued to the Tahsildar to be carried out was no doubt issued by him in accordance with the instructions that he had received from the Collector, but it was all the same, I consider, the order of the Sub-Collector passed on the appeal petition and was consequently, I consider, not issued in violation of the rule as to appeals in cases such as this.

I would, for these reasons, hold that the action of the Revenue authorities in this case was warranted by law and would accordingly dismiss this appeal with costs.

Bhashyam Aiyangar, J.:—Plaintiff claiming as purchaser from one Subbaraya Asari, the vendee under the 1st defendant, sues the Secretary of State for India in Council, the only contesting defendant, to establish his right to the site mentioned in the plaint on which the 1st defendant erected a building at a cost of nearly

Sappani Asari
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Collector of
Coimbatore.
Moore, J.

Sappani Asari v. Collector of Coimbatore. Rs. 200. It is alleged that the 1st defendant obtained a valid title to the site by virtue of a grant made by the Tahsildar of Erode, under the Darkhast rules.

Bhashyam
Aiyangar, J.

The second defendant, who will hereafter be referred to as the defendant, in his written statement contests the plaintiff's suit principally upon the following grounds:—

- (1) That the two title-deeds on which 1st defendant's title rests having been cancelled in appeal are inoperative;
- (2) That the title-deeds were obtained by the 1st defendant not on his own behalf, but *benami*, on behalf of one Virappasari, to whom the land had been previously refused; and
- (3) That the title-deeds purport to convey an extent of more than 4 cents of land and is therefore *ab initio* void, so far as relates to such excess (which appears to be about half a cent.)

The undisputed facts on which the decision of the case mainly turns are as follows:—On the 2nd September 1893, the 1st defendant applied to the Tahsildar of Erode for the grant to him of the plaint site, and on the 8th September the Tahsildar granted the site to him and issued to him a title-deed (Exhibit D). After conveying the site to the 1st defendant, the title-deeds provide that he should build a house thereon within three months, and that, in default of his doing so, he shall forfeit his right to the site. One Vadamalai Asari, who had previously applied to the Tahsildar for the same site and was unsuccessful both before the Tahsildar and before the Divisional Officer on appeal (Exhibit V, dated 1st September 1893), preferred an appeal to the Collector (Exhibit III, dated 21st September 1893) against the order of the Divisional Officer refusing to grant to him the site, and also against the subsequent action of the Tahsildar in making the grant to the 1st defendant on the 8th September 1893. The Collector passed the following order on the 22nd February 1894 (Exhibit VI): "The whole thing is irregular from beginning to end. It is likely that the land is vested in the Municipal Council. If so, Revenue officers have no jurisdiction. Even if not, the present grant is invalid for want of consultation of the Council. All orders about the land are set aside and the Tahsildar must take up the matter *de novo*." This

order was communicated in due course for information and guidance to the Tahsildar of Erode through the Divisional Officer on the 16th March 1894. The Tahsildar issued orders on the 4th April 1894, informing the 1st defendant and the village officers that, in pursuance of the Collector's order, he has cancelled the title-deed issued to the 1st defendant on the 8th September 1893, and that he should, if so advised, apply to the Municipality for grant of the site. Apparently it was subsequently discovered that the site did not belong to the Municipal Council, but was at the disposal of Government. The Municipal Council were consulted by the Tahsildar, and they signified their approval of the grant of the site [Exhibits A and H (1) 18-10-94]. The Tahsildar thereupon rejected Vadamalai Asari's application and granted the 1st defendant's application for the site, by his order, dated the 2nd March 1895 (Exhibit XI), which runs as follows:—"Two persons named Vadamalai Asari and Krishnasami Asari apply for this place. The site was granted by the late Tahsildar to Krishnasami Asari, and he has built a building also on it. He has no house in this village. It is learnt that Vadamalai Asari has a house in the village. Consequently the said site has been granted to Krishnasami Asari who has no house in this village and who has already erected a building. He should not interfere with the tamarind tree standing on the ridge. As there are more sites vacant in this village, Vadamalai Asari may take another site."

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Accordingly a fresh title-deed was issued to the 1st defendant on the 9th April 1895 (Exhibit F). Vadamalai Asari being dissatisfied with this preferred an appeal to the Sub-Collector of Coimbatore (the Divisional Officer) on the 15th April 1895 (Exhibit IV). The Divisional Officer apparently referred this appeal to the Collector, and on the 11th December 1895, the Collector passed an order (Exhibit VII) annulling the grant. The Collector's order was sent to the Divisional Officer who communicated the same to the Tahsildar for information and guidance and submission of the report at the end of the period.

As far as I have been able to ascertain, the Darkhast rules as to the grant of house-sites; bearing upon this case, which were in

SappaniAsari existence at the time of the first grant (8th September 1893) and
v. of the second grant (9th April 1895) were the following :—
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- (1) 'Unclaimed portions of village sites not being common lands needed for general use, may be granted for building purposes to *bona fide* applicants in accordance with a scale fixed or to be fixed by Collectors with reference to the requirements of their districts, subject to the conditions embodied in the title-deed granted under paragraph 3 below. The scale may be drawn up and altered by Collectors at their discretion, but the following is suggested as a guide where no such scale already exists :—

To pattadars paying Rs. 50 and upwards—10 cents ; to other pattadars—5 cents ; to non-pattadars—2 cents (Board's Proceedings, dated 8th July 1891, No. 409).

- (2) 'Tahsildars and Deputy Tahsildars are authorised to grant house-sites with reference to the prescribed scale. If a larger extent than is allowed in the scale is applied for, the sanction of the Divisional Officer should be obtained etc.' (Board's Proceedings, dated 8th July 1891, No. 409).
- (3) 'When applications are received for house-sites within Municipal limits, the Municipality concerned should invariably be consulted before such applications are considered. It is, moreover, beyond the competence of Revenue officers to deal with lands which have become vested in the Municipal Council (Board's Proceedings, dated 25th May 1893, No. 274).

No provision was made for any appeal to a superior officer from the order of a Tahsildar with respect to grants of building sites until the 1st February 1894 ; when, with the sanction of Government the following note was added to (2) above :—From the Tahsildar's or the Deputy Tahsildar's decision an appeal may, however, be made to Divisional Officer if lodged within 30 days, and his order thereon will be final. No building operations can be commenced on the authority of a grant by a Tahsildar or a Deputy Tahsildar before the expiry of the appeal time prescribed above, and if an appeal has been lodged within that time until it has been disposed of

(Board's Proceedings, 1st February 1894, No. 51). This is the only Sappani Asari change relevant to the present case, which took place between the Collector of Coimbatore. dates of the first and second grants which, it may be mentioned, were made by two different Tahsildars.

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The District Munsif decreed the plaintiff's suit, but the District Judge on appeal after framing and remitting certain additional issues reversed the decree of the District Munsif and dismissed the plaintiff's suit.

If the 1st defendant acquired a valid title as against the crown, either under the first grant (of the 8th September 1893) or the second grant (of the 9th April 1895) made by the Tahsildar of Erode, plaintiff would be entitled to the decree sought for. The District Judge, while approaching the consideration of the question from the correct standpoint, *i. e.*, that the Tahsildar in making the grant acted only as an agent of Government, and if he exceeded the powers delegated to him, he obviously acted in excess of his authority and could not by such act alienate the property of his principal, the Government, has, in my opinion, erred in holding that though no appeal was provided by the Darkhast rules as they stood at the date of the first grant, yet the Collector had power under section 9 of Regulation II of 1803 to control the proceedings of his subordinate, the Tahsildar, and that he was therefore entitled to revoke the grant under such power, the grant having been made by the Tahsildar without consulting the Municipality. The District Judge evidently overlooked the concluding portion of section 9 of the said Regulation which expressly provides that the Collector has such power of superintendence and control only so far as the same may relate to the executive administration of the revenue "*under the Regulation now enacted or hereafter to be enacted*" (the italics are mine). I have more fully gone into this question and the legal operation of Darkhast rules in my judgment in S. A. 1203 of 1900, and explained that a power conferred by the Governor in Council by an executive act on Tahsildars or Divisional Officers in regard to the disposal of Crown lands cannot be controlled by the Collector under the said Regulation or under Regulation VII of 1828. It is of course open to the Governor in Council by an executive act to subject the exercise of such power to the control of a superior authority and if such superior authority revokes a grant made by

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Subordinate agent, Civil Courts cannot question such revocation, however arbitrary or even whimsical the grounds may be on which he revokes the grant. At the time when the first grant was made by the Tahsildar, his grant was final if he had acted within the scope of his authority and the Collector, therefore, acted *ultra vires* in entertaining an appeal preferred to him by Vadamalai Asari and revoking the grant by his proceedings, dated 22nd February 1894 (Exhibit VI) and his revocation as such is altogether inefficacious.

But if the Tahsildar acted in excess of his authority in making the grant, the grant of course would not bind the crown, though the revocation of the same by the Collector, as an appellate authority, may be inoperative. The District Judge apparently considers that the grant would be void by reason of the Tahsildar not having consulted the Municipal Council before making the first grants. If the rule had provided that no grant should be made without the previous sanction of the Municipality, the grant would, no doubt, be invalid in the absence of such sanction. That would be a delegation by Government of its power under Ss. 22 and 23 Vict., Chapter 41, not to one officer alone but to him jointly with another body. But if the authority is delegated solely to the Tahsildar and he is enjoined in acting within the scope of his authority to consult the Municipal Council and either adopt or reject its advice, the grant would be valid as one made within the scope of the authority of the Tahsildar though he did not observe the regular procedure of consulting the Municipal Council before making the grant. In *Periya Royalu v. Royalu Reddi*¹ it was held that a grant made under the Darkhast rules was not invalidated by reason that the officer making the grant did not follow the procedure prescribed by the Darkhast rules as to the publication of the application in the village by beat of tom-tom, etc. Any other view will lead to infinite confusion and convert all Darkhast rules into rules enforceable by Civil Courts when there is any question as to the validity of a grant or of its revocation by a superior appellate authority. For instance, paragraph 5 of S. O. No. 15 (new edition) prescribes the procedure to be followed on receipt of application, viz., that it should be referred to the village authorities for report, that the fact of application should forthwith be published in the village by beat of tom-tom

1. I. L. R., 18 M. 434.

and that the Tahsildar should consider the village officer's report, etc. Paragraph 8 prescribes some rules of preference when there are two or more applicants. If an appeal against the Tahsildar's action were provided by the rules, the departmental appellate authority may no doubt set aside the grant by reason of the Subordinate officer not having observed the formalities prescribed by the Darkhast rules or for any other reason, notwithstanding that the granting officer acted within the scope of his authority. If no appeal be provided for, or if an appeal be not preferred, can a Civil Court hold that the Tahsildar's grant does not bind the Crown on the ground that by reason of his not having strictly followed the procedure or the rules of preference among applicants he exceeded his authority and acted beyond its scope? If it were competent to a Civil Court to do so, it will be equally competent to it, in the case of a grant which has been confirmed on appeal or superseded by a grant to a rival applicant as entitled to preference, to set aside such grant on the ground that the appellate officer also acted in excess of his authority, in confirming a grant made by the Tahsildar without strictly observing the prescribed procedure and the rules of preference or in making a fresh grant, giving preference to a rival applicant. Unless the distinction between so much of the rules as is really in the nature of a power of attorney defining the scope of the authority of Darkhast officers and the rest which are really in the nature only of instructions to such officers while exercising the power conferred upon them, if fully recognized and enforced, the entire body of Darkhast rules will become unworkable in Civil Courts.

The District Judge apparently also holds both the first and second grants to be invalid, firstly, because Krishnasami Asari was not a *bona fide* applicant and, secondly, because the site in question is by admeasurement a trifle over 4 cents. The order of the Tahsildar, dated 26th March 1895 (Exhibit XI), shows that he considered the 1st defendant to be a *bona fide* applicant. The District Judge, for reasons stated by him in paragraph 5 of his judgment, inclines to the opinion that he is not a *bona fide* applicant whatever that expression may mean and that his object was really to acquire it for his uncle Virappasari whose application for the site had been refused. It is for the officer empowered to make the grant to judge whether the applicant is really in need of a site and

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his application is a *bona-fide* one. The Tahsildar certainly acts within the scope of his authority if he considers a particular person to be a *bona-fide* applicant and grants to him the site applied for, and the Civil Courts cannot define who a *bona-fide* applicant is, and after investigating whether or not a grantee was a *bona-fide* applicant, hold that the grant does not bind the crown because the court differing from the Darkhast officer and also it may be from the appellate Darkhast officer, comes to the conclusion that the applicant was not a *bona-fide* applicant. If the grant was procured by any fraud or misrepresentation on the part of the grantee (Ss. 17 and 18 of the Contract Act), or in collusion with the Tahsildar, or was the result of a mutual mistake of an essential fact (section 20 of the Contract Act) the grant of course would be invalid and not binding upon the crown. It is not pleaded or found in this case that there was any such fraud, misrepresentation, collusion, or mistake.

As regards the excess in the area of the site beyond 4 cents, the defendant pleaded that the grant was void only in respect of such excess, but, in the opinion of the District Judge, the grant is void in its *entirety*. Here, again, the District Judge has misconstrued the Darkhast rule in holding that the Tahsildar acted beyond the scope of his authority. The rule (No. 1) quoted above does not fix the scale definitely; it leaves it to the discretion of the Collectors to fix the scale with reference to the requirement of their districts and alter the same at their discretion, and merely suggests 4 cents in the case of non-pattadars as a guide where no scale already exists. It is not in evidence what the scale was as fixed by the Collector of Coimbatore. Even if no scale had been fixed by the Collector, 4 cents is suggested simply as a guide, and it will be unreasonable to hold that a Tahsildar acted beyond the scope of his authority, if the site is a trifle over 4 cents as in this case or it is subsequently found, by taking a correct measurement, that the extent is slightly over 4 cents.

In my opinion therefore the 1st defendant acquired a valid title to the site under the first grant, and even assuming that he did not acquire a valid title under the first grant, the second grant which was made after consulting the Municipal Council, is not invalid for either of the reasons given by the District Judge, *viz.*,

that the 1st defendant is not a *bona fide* applicant and that the site is in excess of 4 cents.

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It has been urged before us in appeal on behalf of the respondent that an appeal was preferred in respect of the second grant by Vadamalai Asari to the Divisional officer (Exhibit IV, dated 15th April 1895) and that the Collector by his proceedings (Exhibit VII, dated 11th December 1895) cancelled the grant. The addition made to rule 2 (of S. O. No. 37) on the 1st February 1894 providing for an appeal from the Tahsildar's decision to the Divisional officer was in force at the date of the second grant, and if the Divisional officer, to whom the appeal was preferred, had annulled the grant, such cancellation will be conclusive and it cannot be questioned in a Civil Court on any ground whatever. But the Divisional officer instead of himself disposing of the appeal either by confirming or annulling the grant, referred the same to the Collector, requesting 'his orders on the house-site Darkhast appeal of Vadamalai Asari.' It is evident that the Divisional officer must have adopted this step, as it was the Collector himself that entertained an appeal by Vadamalai Asari in respect of this very site when it was granted to the 1st defendant by the Tahsildar in 1893. The Collector cancelled the grant and directed that the 1st defendant should be ordered to vacate the house and remove the materials from the land within three months and that report should be made whether this order was obeyed.

Under the Darkhast rules above referred to the appeal lies only to the Divisional officer and not to the Collector unless the latter happens to be in charge of the division. The question now is whether the grant made by the Tahsildar was cancelled by the Divisional officer or by the Collector. The Collector's order was no doubt communicated to the Sub-Collector who communicated the same to the Tahsildar for carrying it out. But if the act of cancellation or revocation was that of the Collector, it cannot be converted into an act of the Divisional officer merely because it was communicated to him and by him to the Tahsildar to be given effect to. It is clear that the Collector himself annulled the grant on both the occasions, and that he did so on the assumption that under Regulation II of 1803 and VII of 1828, he had general power of superintendence and control over the action of his subordinate officers in the matter of disposal of

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lands under the Darkhast rules. The appeal which, under the Darkhast rules, lies to the Divisional officer not being in the nature of a judicial appeal, the Divisional officer may consult and seek the advice of the Collector, or, as for the matter of that, of anybody else and be guided implicitly if he is so, disposed by such advice in the disposal of the appeal; and if he did so no objection could be taken to it in a Civil Court. But it will, under the circumstances, be a pure fiction to hold that the appeal was disposed of by the Divisional officer in consultation with the Collector, and that the Collector passed the order in question merely by way of communicating to the Sub-Collector his *advice and opinion* in the matter. A fiction of law which is calculated to serve the ends of substantial justice should certainly be welcome and ought not to be closely scrutinized. But I confess that the theory of a legal fiction which is opposed to stern truth does not recommend itself to me when it is resorted to not in furtherance of substantial justice, but the very reverse, with the object of invalidating a grant made by a public servant in the discharge of his duty, on the faith of which, the grantee and the persons deriving title under him have, wisely or otherwise, long ago erected buildings and whom the Revenue officers seek to eject as trespassers, not in due course of law, by imposing what is styled penal assessment on the site and attaching the same with the building thereon under the Revenue Recovery Act, for realizing a crushing penal assessment of Rs. 100 on a plot of 4 cents, as if it were land revenue due to Government by a ryot holding assessed or Inam land under Government.

In my opinion, the 1st defendant had a good title to the site in question under either grant, and the plaintiff claiming under the 1st defendant is entitled to the decree sought for.

I would, therefore, allow this appeal and, reversing the decree of the lower Appellate Court, restore that of the District Munsif. The respondent must pay the costs of the appellant both in this and in the lower Appellate Court.

As my learned colleague, however, concurs in the judgment of the lower Appellate Court, the result will be that the decree appealed against will be affirmed under section 575 of the Civil Procedure Code and this appeal dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Nambi Aiyangar and another Appellants*
 (Defendants).

v.

Yajnanarayana Somayajial and others ... Respondents.

Civil Procedure Code, S. 522 and Religious Endowments Act, S. 16—Award, finality of Nambi
—Appeal—Removal of trustee—Reference to arbitrator under S. 16. Aiyangar

The District Judge has jurisdiction to refer to an arbitrator the question *Yajnanara-*
 of the removal of a trustee arising in a suit instituted under S. 14 of the Religious *yana Soma-*
 Endowments Act *yajial.*

*Perumal Nair v. Saminatha Pillai*¹ followed

Appeal from the decree of the District Court of Tinnevely in
 O. S. No. 3 of 1898.

Plaintiff was a resident worshipper of the temple of Venkata-chalapatiswami in the village of Shermadevi and the defendants were the managers of the temple. The plaintiff alleged that the defendants received certain manibam amounts from Government but did not perform the services and festivals for which those payments were intended. The plaintiff brought this suit for removal of the defendants after obtaining leave under S. 18 of the Religious Endowments Act and for damages. The District Judge referred this suit for arbitration under S. 16 of the Act. The arbitrator was chosen by the parties. The arbitrator gave his award removing the defendants and directing them to pay the damages. The District Judge confirmed the award. Hence this appeal.

Rajah T. Rama Row for appellants.*M. R. Ramakrishna Aiyar* for 1st respondent.*T. V. Seshagiri Aiyar* for respondents 2 and 3.

The Court delivered the following

JUDGMENT:—Under S. 522, Civil Procedure Code, no
 appeal lies against a decree on an award passed under that section

* A. No. 21 of 1900.

12th August 1901.

1. I. L. R., 19 M. 498.

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yajial.

'except in so far as the decree is in excess of, or not in accordance with the award.'

Neither of these conditions exist in the present case, and we cannot accede to the contention of the appellant's Vakil that the District Judge had no jurisdiction to refer to the arbitration, the question whether the trustee should be removed as prayed for in the plaint. A similar contention was raised and overruled in the case of *Perumal Naik v. Saminatha Pillai*¹.

We must therefore reject this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Venkata Papayya Row Appellant*
(Plaintiff).

v.

The Secretary of State for India in Council. Respondent
(Defendant).

Venkata Papayya Row v. The Secretary of State. Revenue sale—Purchase by Government—Occupancy Ryot—Tank for irrigation, not included in sale—Easement of right to water—Easements Act, S. 13, Cl. (b)—Wet rate—Water cess—Right to levy—Madras Act VII of 1865—Remission of wet rate, by Divisional Officer, effect of, on Government.

Where the home farm lands of a Zemindar irrigated by a certain tank are brought to sale for arrears of Government revenue (but not the tank) and are purchased by Government, the latter becomes entitled by easement under S. 13, Cl. (b) of the Indian Easements Act to the use of the water in the tank for the purposes of irrigating the said lands.

The tank not being the property of Government, the latter is not entitled to levy any cess under Madras Act VII of 1865. Its only right is to levy wet assessment and supply water by way of easement over the tank to its ryot in occupancy of the said lands.

The Divisional Officer or the Collector has no authority to remit the wet rate (or the difference between the dry rate and wet rate) in favor of the Zemindar and such remission even though continued for a long series of years (from 1869 to 1892) is not binding on Government if the latter is clearly entitled to wet rate on the lands.

* S. A. 884 of 1900.

1. I. L. R., 19 M. 498.

6th March 1902.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 162 of 1899 presented against the decree of the Court of the District Munsif of Bezvada in O. S. No. 255 of 1897.

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P. S. Sivaswami Aiyar for appellant.

The Government Pleader (E. B. Powell) for respondent.

The Court delivered the following

JUDGMENT:—Prior to and in the year 1846, when the village of Vellathur and certain other villages forming part of the Zemindary of Mailavaram were brought to sale for arrears of revenue due to Government, and purchased by Government, the wet lands in question in that village used to be irrigated from a tank belonging to the Zemindar of Mailavaram, situate in the Zemindary village of Kuntamukkala, which was not included in the sale. At that time, the wet lands in question were the home farm lands of the Zemindar, and he continued in occupation of the same after the purchase by Government of that and other villages. In consequence of the villages having been purchased by Government, they became ryotwari villages and the persons in occupation of the lands therein, including the Zemindar, became ryots under Government. By the sale the melwaram right in the villages brought to sale passed to Government, and the Government became entitled to levy wet assessment on the lands in question which were then in the occupancy of the Zemindar as a ryot and consequently to have the same irrigated from the then existing source of irrigation, viz., the Zemindar's tank in Kuntamukkala village. *Vide* Section 13, cl. (b), Indian Easements Act. The Government as Melwaramdar of the village of Vellathur in question was thus entitled only by way of easement to the use of the water of the tank in Kuntamukkala village for the irrigation of the wet lands in question, and the Government, therefore, could not under Madras Act VII of 1865 levy a cess for supply of water to the lands in question from the Kuntamukkala tank which did not belong to it. Its right was only to levy wet assessment and supply water by way of easement over the Kuntamukkala tank to its ryot in occupancy of the lands in question. The action of the Settlement Department in 1866 in assessing the lands in question with a consolidated wet rate was right; but in 1869 the Head Assistant Collector in charge of the Division, without any authority whatever, virtually upset the settlement made in 1866

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and issued instructions to the subordinate revenue officers to hand over to the Zemindar the difference between the dry rate on the lands and the settlement consolidated wet rate fixed in 1866, some time before which the Zemindar sold the lands in question to one K. Seshayya, with whom the settlement was made in 1866 and from whom the consolidated wet rate has since been collected by Government. The instructions issued by the Head Assistant Collector in 1869 were carried out till 1892, and on a reference made to the Board of Revenue, that authority disapproved of the action of the Head Assistant Collector in crediting the Zemindar yearly with the difference between the consolidated wet rate and the dry rate and upholding the settlement made in 1866, directed in 1894 that no portion of the assessment should be paid over or credited to the Zemindar. If the plaintiff had not transferred the holding in question to K. Seshayya, but continued in occupancy thereof, it would be difficult to suggest any principle on which it could be contended that he would be liable to pay only dry rate to Government and claim exemption from payment of wet rates, though by the sale to Government in 1846 the melvaram right in these lands *as wet lands* became vested in Government. By merely transferring the holding to a third party, the melvaram right of the Government cannot be prejudiced and the Zemindar cannot become entitled to the difference between the melvaram in respect of these lands as dry lands and the melvaram in respect of the same as wet land. The plaintiffs' claim therefore to a declaration that he is entitled to compensation for the use of the water of his tank for the irrigation of the lands in question is entirely unsustainable; and his claim for payment to him of the difference between the dry and wet rates since and subsequent to 1892, from which year the payment was discontinued, is equally unsustainable. The learned pleader for the appellant also contends that the plaintiff is entitled to the relief claimed on the ground that a contract should be implied from the action of the Head Assistant Collector in 1869, and the payment to him of the difference between the dry and wet rates up to the year 1892. It is not pretended that the action of the Head Assistant Collector was authorised by Government or that the same was subsequently ratified. Even if from the fact of yearly payments having been made to the Zemindar since 1869 or even prior thereto, an agree-

ment could be implied to continue such payments for ever, it is clear that it cannot be binding on the Government for the simple reason that it is not within the scope of the authority of Divisional officers or of the Collector to bind the Government by any such agreement which sacrifices the legitimate interests of Government and has neither been authorized nor ratified by it.

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The second appeal, therefore, fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr Justice Benson.

Thathachariar Appellant*
(*Plaintiffs' Legal Representative, Decree-holder*).
v.

Venkatesa Tawker and another . . . Respondents (*Defendants, Judgment Debtors*).

Civil Procedure Code, Ss. 230, 232 and 245—Appeal—Hearing—Judgment reserved—Death of party—Representative not brought on record—Delivery of judgment—Locus standi of representative to appeal.

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Where after the hearing of the appeal but before delivery of the judgment the appellant dies, the fact that his representative has not been brought on the record is no bar to the judgment being pronounced.

The judgment so pronounced relates back to and speaks from the date when judgment was reserved.

The representative of a deceased appellant has under such circumstances a *locus standi*, to appeal from a decree passed in such appeal notwithstanding the fact he may not have been brought on the record. He is not bound under S. 232, C. P. C., to apply to the Court which passed the decree. It is enough if he applies to the Court to which he appeals, to be brought on the record as representative.

An unverified petition may be returned for amendment under S. 245, O. P. C., but the fact that it is so returned and re-presented after being amended does not prevent the operation of the limitation of 12 years under S. 230, C. P. C.

* A. A. A. O. No. 44 of 1901.

25th March 1902.

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Where, therefore, on the last day of the 12 years period an unverified application was made for execution by one who did not produce his power of attorney and the petition was returned for amendment under S. 245 and was amended within the time allowed by Court and when re-presented was more than 12 years after the date of decree.

Held, that the execution application was barred by limitation.

Appeal from the order of the District Court of Tanjore in C. M. A. No. 939 of 1900 presented against the order of the Court of the District Munsif of Tanjore in E. P. No. 404 of 1900 (O. S. No. 9 of 1888 on the file of the Court of the District Munsif of Trichinopoly).

P. S. Sivaswami Aiyar and V. Visvanadha Sastry for appellant.

V. Krishnaswami Aiyar and T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT:—A preliminary objection has been taken to the hearing of this appeal. The first ground on which the objection was based was that the decree-holder having died after the hearing of the appeal before the lower appellate Court, but before the delivery of the judgment by that court, the appellant who is the son of the decree-holder, ought to have applied, to be brought on the record before the judgment of the lower appellate Court was delivered. So far as this ground of objection is concerned, we think the judgment should be read as from the date when the court reserved judgment. As regards this question the authorities appear to be uniform. (See *Chetan Charan Das v. Balbhadra Das*¹, *Surendro Keshub Roy v. Doorgusoondery Dosse*² and *Ramacharya v. Anantacharya*³), and we are of opinion that the appellant is not incompetent to prefer this appeal by reason of the fact that he had not been brought on the record before the judgment of the lower appellate Court was delivered.

The second ground on which the preliminary objection was based, was that the decree having been transferred from the decree-holder to the appellant by operation of law, the appellant under section 232

1. I. L. R., 21 A. 814.

2. I. L. R., 19 C. 513.

3. I. L. R., 21 B. 314.

of the Code of Civil Procedure ought to have applied for execution to the court which passed the decree. It was not incumbent on the appellant to make such an application. He adopted the proper procedure in applying to this court to be brought on the record, and an order having been made by this court bringing him on the record, he is competent to present this appeal. The preliminary objection is over-ruled.

Thatha-
chariar
v.
Venkatesa
Tawkur.

As regards the merits, the twelve years' period of limitation expired when the court was closed. The appellant presented his petition for execution on the first day on which the court opened, and the court made an order under section 245 allowing it to be amended. The petition was amended within the time ordered and the appellant contends that this having been done he is not time-barred. The appellant applied for execution on an unverified petition without producing any evidence to show he held a power of attorney entitling him to apply and without producing his power of attorney. In the circumstances, we think the Court ought to have rejected the application and not to have made an order allowing it to be amended. Such an order would have left it open to the appellant to make an effective application if he had not postponed taking action till the last day of the 12 years' period of limitation.

We think the petition presented to the Court on the last day before the period of limitation expired cannot be said to have been an application which has the effect of preventing the operation of the statute.

S. 245, no doubt, contemplates that an unverified petition may be returned for amendment, but it does not follow that a petition which is not verified is an application which will prevent the operation of the statute of limitation. On the facts of this case we are of opinion that there was no application for execution such as the law contemplates made before the expiration of the period of limitation.

The appeal is dismissed with costs.

As the petitioner did not put in his application to be declared an insolvent within the prescribed time, he was liable to be committed to jail; and if this had been done, he would certainly have had to put in a fresh application under the third clause of paragraph (b) of the proviso to S. 336, Civil Procedure Code. He was not, however, so arrested, and it is, therefore, still open to him to apply under S. 344, Civil Procedure Code, to be declared an insolvent on the strength of the permission given to him to do so on the 23rd January 1899.

Alagappa
Chetti
v.
Sarathambal.

This appeal is allowed, the order of the District Judge is set aside with costs and the appeal is sent back to him for decision of the other points raised.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Moore.

Ramakishore Dosjee... Appellant*
(Plaintiff's legal
representative).

v.

The Coimbatore Spinning and Weaving
Co., Limited ... Respondent
(Defendant).

Mahant—Byragi of a mutt—Money paid for purchase of shares—Presumption as to ownership—Onus of proof—Mutt property—Incapacity to acquire—Hindu Law Tests—Moral rules—Calls upon shares—Payments—Estoppel—Evidence Act, S. 115—Refusal to register by directors—Action unreasonable or capricious—Rectification of registry—Application to Civil Court—Indian Companies Act VI of 1882, S. 58.

Ramakishore
Dosjee
v.
The Coimba-
tore Spinning
and Weaving
Co., Limited.

There is no presumption that money paid by the Mahant of a mutt for the purchase of certain shares belongs to the mutt and the onus lies upon the person who alleges that it belongs to the mutt to prove the same.

A mahant of a mutt is not incapacitated from holding or acquiring property for his own personal benefit. The texts in the Hindu Sacred Law books that a byragi is condemned to a life of perpetual poverty and is incapable of acquiring property for his own use and benefit are mere moral precepts and cannot be looked on as anything more than counsels of perfection.

The mere fact that the plaintiff made certain payments in respect of calls by the company for these shares as representative of the mutt, and the mere fact that

Ramakishore Dosjee v. The Coimbatore Spinning and Weaving Co., Limited. the company accepted such payments from plaintiff and alluded to these shares as belonging to the plaintiff would not estop the company from contending that the shares did not belong to the mutt when the plaintiff was presumably aware of all the facts and the company did not lead the plaintiff to believe anything. Where, under the rules of a company, the directors are required to register a person as holder of the share "when he becomes interested in the shares in consequence of death, &c., or by any lawful means other than transfer in accordance with Article 20, upon the applicant producing such evidence as the board thinks sufficient," the directors would not be acting unreasonably or capriciously if upon the applicant's failing to produce evidence they insist upon an indemnity-bond from the applicant as a condition precedent to the registry of his name.

The only course open to the applicant is to apply to the civil court under S. 58 for rectification of the register; and an order may then be made by the civil court if the applicant shews that the directors have acted capriciously and neither honestly nor reasonably.

Appeal from the decree of the District Court of Coimbatore in O. S. No. 22 of 1898.

E. Norton and *S. Gopalasamy Aiyangar* for appellant.

K. Brown for respondent.

The Court delivered the following

JUDGMENT :—The main argument advanced in support of this appeal is that the application made by Mahant Bagavan Dosjee for shares in the Coimbatore Spinning and Weaving Co., was made by him in his capacity as Mahant of the Mutt at Tirupati, that the money paid by him for these shares was a portion of the funds of the Mutt, that the Mahant being a Byragi had not and could not have had any funds of his own out of which he could have purchased these shares, that the Directors of the Company must have been well aware that such was the case and that consequently, on Bagavan Dosjee vacating the post of Mahant, the Company was bound to transfer the shares standing in his name to the name of the plaintiff, his successor in the office of Mahant. The evidence on the record does not bear out these contentions. It cannot be held that Exhibit XXIII shows that Bagavan Dosjee applied for the shares in his capacity of Mahant on behalf of the Mutt. The applicant there applies for certain shares, states that he has paid Messrs. Arbutnot & Co. a deposit on account of such shares, asks that the shares may be allotted to him, agrees to accept them and requests that his name may be entered on the register of shareholders. He signs his name

as Sreeman Bagavant Dosjee and gives as his address "Mahant of Atheenam Bavajee Mutt, Tirupati." There is nothing in this application to show that it was made on behalf of the Mutt, or that the money paid for the shares consisted of Mutt funds. In Exhibit XXIV, an extract from the share register, the shareholder is given as Sreeman Bagavan Dosjee. Nothing is said as to the Mutt having any concern in the transaction. The plaintiff examined no witnesses before the District Court and made no attempt to prove by evidence as to where Bagavan Dosjee got the money that he paid for the shares or that that money was a portion of the funds of the Mutt. The learned counsel for the appellant has, at the hearing of this appeal, referred to certain texts in the Hindu Sacred Law books to show that a Byragi is condemned to a life of perpetual poverty and is incapable of acquiring property for his own use and benefit. Such precepts cannot be looked on as anything more than counsels of perfection and cannot be held to carry much weight in the absence of clear and satisfactory proof that, as a matter of fact, Bagavan Dosjee had no private funds at his disposal. Exhibit NN, the deed under which Bagavan Dosjee, after he had been convicted of a criminal offence and committed to jail, appointed the plaintiff as his successor in the office of Mahant and transferred to him the management of all the Mutt property, does not support the contention now put forward that the executant was not and could not have been possessed of any private funds, for in that document, he is described as "living by lands and acquisition from disciples." It will further be remarked that in this document in which the various descriptions of property held by the Mutt are set out in considerable detail no mention is made of the shares in this company. It is only reasonable to assume that if these shares which are of considerable pecuniary value, had been looked upon by the executant as Mutt property, they would have been mentioned in this document. It must be held that there is no presumption that the money paid by Bagavan Dosjee belonged to the Mutt and that the plaintiff has completely failed to prove such to be the case.

It appears that shortly after Bagavan Dosjee had been sent to jail, the plaintiff as his successor in the post of Mahant paid from time to time certain sums as a portion of what was due to the company on account of the shares allotted to Bagavan Dosjee. It is further in evidence that the company received these moneys

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from the plaintiff, credited them towards what was due on account of these shares, and also that Mr. Stanes on behalf of the company in certain correspondence which has been filed as evidence alluded to these shares as being the plaintiff's shares and also as belonging to the Mahant. The learned counsel who has appeared here in support of this appeal urges that in consequence of these acts the company is estopped from denying that the shares are the property of the Mutt and that on Bagavan Dosjee ceasing to be Mahant, the plaintiff by virtue of his succession to the post of Mahant became the owner of these shares. It is impossible to hold that this contention is a valid one. S. 115 of the Evidence Act provides that when a person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative can be allowed in any suit between himself and such person to deny the truth of that thing. It cannot possibly be held that the Spinning Co., by its action led the plaintiff to believe anything. The plaintiff was presumably aware of all the facts relating to the purchase of the shares, the source from which the money paid for them was derived and the capacity in which Bagavan Dosjee acted when he bought them. The company had no especial information as to such matters and could not by its action have caused the plaintiff to believe anything respecting them. It is next urged that when the plaintiff applied to the company to have the shares in the name of Bagavan Dosjee transferred to his name, the company was bound to comply with his request. It is contended that if the company had transferred the shares the plaintiff would have satisfied all calls made in respect of them and that the default charged against the plaintiff in consequence of which the shares were eventually declared to have been forfeited was due to the failure of the company to comply with the plaintiff's reasonable request that the shares should be transferred to his name. The correspondence shows that the plaintiff applied to have the shares transferred to his name. The directors of the company replied that they were willing to make the transfer if Bagavan Dosjee would execute the necessary documents, or in case this could not be arranged if the plaintiff would give them an indemnity bond in the name of the Mutt (Exhibit R). No application for transfer was ever made by Bagavan Dosjee, and the

plaintiff refused to execute an indemnity bond. The result was that after the necessary formalities had been gone through the shares were declared to have been forfeited. There can be no doubt that the company was from first to last justified in the course of action that it followed. Article 25 of the Company's Articles of Association provides for the action that it is necessary should be taken to get shares registered in the name of a person claiming to be entitled to such shares where no form of transfer signed by the transferor such as is provided for in Art. 20 has been submitted to the company. Article 25 provides that when any person becomes interested in a share in consequence of the death, bankruptcy etc., of any shareholder, or by any lawful means other than by a transfer in accordance with article 20, he may upon producing such evidence as the Board thinks sufficient be registered as the holder of the share. It is for the applicant for registration to produce evidence such as to satisfy the Board that the transfer can be made. In the present case the plaintiff produced nothing that could be called evidence to show that he was entitled to have the shares standing in Bagavan Dosjee's name transferred to his name and when the directors, under these circumstances, declined to make the transfer without a bond of indemnity the plaintiff refused to execute such a bond. On such refusal the plaintiff's proper remedy as the person aggrieved by the order of the directors was to apply under S. 58 of the Indian Companies Act to a Civil Court for an order to have the Register rectified (*In the matter of the Bombay Fire Insurance Company, Ltd—Ex parte R. Gilbert*¹). He did not so apply, but even if he had taken such action his application must have been refused unless he had been able to show that the directors had acted capriciously and not honestly and reasonably. (Reference may be made to *In re Gresham Life Assurance Society—Ex parte Penney*² and *In re Coulfort China Co.*³).

It is clear that the plaintiff in the present case could not have proved to the satisfaction of a court that the directors acted capriciously and unreasonably as it is shown that the holder of the shares never applied to have them transferred and that the plaintiff never made any attempt to produce any such evidence as the directors were clearly entitled to insist or to substantiate his

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Co., Limited.

1. I. L. R., 16 B. 398.

2. I. L. R. 8 Ch. 446.

3. (1895) 2 Ch. 404.

Ramakishore Dosjee v. The Coimbatore Spinning and Weaving Co., Limited. claim to have them transferred to his name. The directors in refusing to do anything in the absence of such evidence without an indemnity bond from the plaintiff must be held to have acted reasonably and with a proper regard for the interests of the company. The decision of the District Judge is, in our opinion, right and this appeal must be dismissed with costs.

Solicitors for respondent: *Barclay, Orr, David and Brightwell.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Manjunatha Kamti ... Appellant*
v. (2nd Defendant).
 Devamma alias Gunthiamma Respondent
 (Plaintiff).

Manjunatha Kamti v. Devamma. *Limitation Act (XV of 1877), Sch. II, Art. 64, Contract Act (IX of 1872) S. 251—Reciprocal demand—Account settled by partner—Effect of settlement on Partnership.*

Under Art. 64 of the Limitation Act, it is not necessary to show that there were reciprocal demands between the parties.

One partner has authority to settle an account between the partnership and a stranger and such act of the partner binds the other partners under S. 251, Contract Act.

Appeal under S. 15 of the Letters Patent against the judgment of Mr. Justice Benson, dated 23rd September 1901, in C. R. P. No. 33 of 1901 preferred from S. C. S. No. 275 of 1900 on the file of the Subordinate Judge's Court of South Canara.

T. V. Seshagiri Aiyar for appellant.

K. P. Madhava Rao for respondent.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that this case comes under Art. 64 of the 2nd Schedule attached to the Limitation Act. It is urged that there were no reciprocal demands between the plaintiff and the defendants in this case and that, consequently, Exhibit A cannot be looked on as an account stated. The judgments in

*Ganga Prasad v. Ram Dayal*¹ and *Shankar v. Mukta*² are relied on in support of this contention. If these judgments do bear the interpretation put on them, we should not be prepared to follow them, as we are clearly of opinion that in order to bring a case under Art. 64 it is not necessary that there should be reciprocal demands between the parties. Even if, however, we did accept their view, there would be no ground for interference with the decision of the learned Judge, as the evidence of the 1st defendant examined as the 1st witness for the plaintiff shows that there were reciprocal demands. Under S. 251 of the Contract Act, it is clear that the 2nd defendant is bound by the act of the 1st defendant in settling the account between the partnership and the plaintiff. This appeal must be dismissed with costs.

Manjunatha
Kamti
v.
Devamma.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Moore.

Nagasawmy Aiyar and others... Appellants*
(Plaintiffs).

v.

Ramaiyar and another .. Respondents
(Defendants).

Res judicata—Partnership for a term—Suit for dissolution—Consent order of reference
—Adjudication—Partner not entitled to damages.

Nagasawmy
Aiyar
v.
Ramaiyar.

Where the partnership was for a term and a suit was brought by some partners for dissolution and the other partners contended that the partnership could not be dissolved, or, if dissolved, that they would be entitled to damages and when the case came on for the settlement of issues a consent order of reference to chambers was made in order that accounts might be taken and the defendants therein subsequently brought this suit for damages :—

Held (1) that the order of reference amounted to an adjudication by consent, that on the terms of the partnership the plaintiffs in that suit were entitled to a dissolution and that the defendants were not entitled to damages,

(2) that the claim in the present suit was accordingly barred by *res judicata*.

Appeal from the Judgment of Mr. Justice Boddam, dated 11th December 1901, in C. S. No. 119 of 1901, on the file of the High Court in the exercise of its ordinary original civil jurisdiction.

* A. No. 1 of 1902.

1. I. L. R. 23 A. 502.

15th August 1902.

2. I. L. R., 23 B. 518.

Nagasawmy
Aiyar
v.
Ramaiyar.

K. Narayana Rau and K. Srinivasa Aiyangar for appellant.

P. S. Sivaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT:—In suit No. 213 of 1900 the plaintiffs, who are defendants to the present suit, sued the plaintiffs in the present suit for dissolution of partnership. Among the terms and conditions of the partnership as set out in the plaint (and apparently not denied by defendants in that suit) are the following: “That “the defendants should work in the business as working partners for a period of five years, but that should during the said “period disputes arise between the parties or only a small profit “be returned, then the plaintiffs should have the option of dissolving the partnership”. In this suit the defendants (the present plaintiffs) raised the following plea:—

“Defendants submit that this suit should be dismissed with “costs, or if the court is of opinion that the partnership ought not “to continue, plaintiffs be ordered to pay the defendants in addition to their share of the profits already earned damages for the “unexpired portion of the said period of 5 years calculated on “the said profits.”

When the suit came on for settlement of issues, the defendants (present plaintiffs) did not ask for an issue as to whether the plaintiffs were entitled to a decree for dissolution and an order of reference to chambers was made in order that the accounts of the partnership might be taken. This order of reference was made by consent, and, as it seems to us, amounts to an adjudication that, on the terms of the partnership agreement and in the event which had happened, the plaintiffs were entitled to a decree for dissolution. It also, as it seems to us, amounts to an adjudication on the question of the right of the plaintiffs in the present suit to damages for the unexpired period of 5 years. If a state of things had arisen which entitled the plaintiffs in the former suit under the terms of the partnership agreement to have the partnership dissolved, it necessarily follows that the defendants in that suit were not entitled to recover damages in respect of the period during which the partnership would have gone on if events had not

happened which entitled the plaintiffs to have the partnership dissolved before the expiration of the period.

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Ramaiyar.

It seems to us that the order of reference to chambers is an adjudication by consent on the question of the right of the plaintiffs in that suit to a decree for dissolution and on the right of the defendants in that suit (the present plaintiffs) to damages.

We think the claim in the present suit is *res judicata*.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*.

Pottivadu and another ... Petitioners.*

v.

Veerayya ... Respondent.

Penal Code (XLV of 1860), S. 447—Criminal Procedure Code (V of 1898), S. 522—Criminal trespass—Criminal force, use of, Pottivadu v. Veerayya.

The use of criminal force is not a necessary ingredient of an offence under S. 447 of the Penal Code.

Under S. 522 of the Criminal Procedure Code two conditions must be satisfied.

- (1) Some person must have been convicted of an offence attended by criminal force.
- (2) Some person must have been dispossessed of immoveable property by such force.

In order to satisfy the first condition it is not necessary that the offence should involve as a necessary element the use of criminal force. It is enough if the offence, though not involving the use of criminal force as an ingredient, is yet attended by the use of criminal force.

*Ram Chandra Boral v. Jityandria*¹ dissented from.

Where, therefore, petitioners were convicted of criminal trespass under S. 447, Penal Code, and the Magistrate made an order, S. 522, Criminal Procedure Code, directing that the complainant should be restored to possession without finding that such trespass was attended by criminal force and that the complainant was dispossessed by such force.

Held on revision that the order was made without jurisdiction.

* C. B. C. No. 489 of 1901.

19th February 1902.

(Cr. R. P. No. 313 of 1901.)

1. I. L. R., 25 O. 484.

Pottivadu
v.
Veerayya.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the proceedings of the Court of 2nd Class Magistrate of Kasibugga in proceedings No. 138 of 1901 in C. C. No. 354 of 1900.

V. Ramesam for appellant.

Respondent was not represented.

The Court made the following

ORDER:—In this case the petitioners were convicted of an offence under section 447 of the Indian Penal Code (criminal trespass) and an order was subsequently made which purported to be under section 522 of the Code of Criminal Procedure. The question is, was this order under section 522 a legal order or is it bad as having been made without jurisdiction. The conditions precedent that must exist before an order can be made under section 522 are (1) some person must have been convicted of an offence attended by criminal force and (2) some person must have been dispossessed of immoveable property by such force.

It is clear that the use of criminal force is not a necessary ingredient of an offence under S. 447 of the Indian Penal Code. The Calcutta High Court have held¹ that "an offence attended by criminal force" means an offence of which criminal force is an ingredient (*Ram Chandra Boral v. Jityandria*²). I am inclined to think that this is too narrow a construction to place on the very general words "attended by criminal force." In the present case, however, there is no finding by the court which convicted the petitioners that any criminal force was in fact used by the petitioners or that the complainant was dispossessed of the land by such force. This being so, and criminal force not being an ingredient of the offence for which the petitioners were convicted, I think the order which purported to be made under S. 522 of the Cr. P. C., was made without jurisdiction and must be set aside. Ordered accordingly.

I order that petitioners be restored to possession.

1. But see *Ishan Chandra v. Dina Nath*, I. L. R., 27 C. 174.—*Ed.*

2. I. L. R., 25 C. 434.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Moore.

Narayana Iyengar Appellant*
 v. (1st Defendant).
 R. G. Orr and another Respondents
 (Plaintiffs).

Landlord and tenant—Zemindar and ryot—Nature of holding—Patta lands—Trees on such land—Rights of ryot. Narayana Iyengar v. R. G. Orr.

Madras Regulation XXV of 1802 does not make the Zemindar the proprietor of the soil. That regulation did not, as explained by Regulation IV of 1822, define, alter or modify the rights of the landholder or the tenant.

The Zemindar is the proprietor of waste lands by virtue of the regulation.

There is no analogy between an English tenant and an Indian ryot.

Land may be divided into the two main heads of Kudivaram interest and Melvaram interest. The holder of kudivaram right is not a tenant of the holder of the melvaram right but is a co-owner with the latter.

A ryot holding lands in a Zemindari village is, in the absence of proof of contract or of special or local usage to the contrary, entitled, as a ryot holding lands in a Government village, to hold his lands so long as he pays what is due.

Ryots having permanent occupancy rights in a Zemindari village are entitled to the ownership of the trees standing in their patta lands and the landlord claiming any such right must show that it exists by reason of any special or local custom¹.

Second appeal from the decree of the Subordinate Judge's Court of Madura (East) in A. S. No. 62 of 1900 presented against the decree of the Court of the District Munsif of Manamadura in O. S. No. 442 of 1898.

T. Rangachariar and *S. Srinivasa Aiyangar* for appellant.

K. Srinivasa Aiyangar (for *P. S. Sivaswami Aiyar*) for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs are the lessees of the Sivaganga Zemindari in Madura District. The defendants are ryots with permanent occupancy rights in their lands. The question for decision is whether *babul* trees which have grown on the defendants' pattah land belong by law to the plaintiffs or to the defendants. The Courts below have held that they belong to the plaintiffs. Against this decision the 1st defendant appeals. We have no doubt the appeal is well founded. The plaintiffs do not rely on agreement or any custom whereby their right to the trees is established. The first issue as to the ownership of the trees was originally in general terms, but at the request of the plaintiffs' vakil

* S. A. No. 59 of 1901.

3rd April 1902.

1. Apparently it is otherwise in Allahabad See *Tamli v. Sheoadhar*, I. L. R., 20 A. 211:—*Ed.*

Narayana
Iyenger
v.
R. G. Orr.

it was restricted to "whether the trees belong, by law, to plaintiffs or to defendants." The plaintiffs contend and the courts below have held, that "according to Regulation XXV of 1802 the proprietary right in the soil vests in the Zemindar; and as it is a well established principle of law that the trees go with the land to which they are attached, the Zemindar is the owner of the trees also."

We think that this view is radically unsound. It takes no account of Regulation IV of 1822, and it ignores the true relations and mutual rights that exist between Zemindars and their so-called tenants in this part of India. Regulation IV of 1822 was passed expressly because Regulation XXV of 1802 and some other early Regulations had been misunderstood and had been so construed as to infringe the established rights of the actual cultivators of the soil. The Regulation recites that such rights are "properly determinable by judicial investigations only," and it declares that Regulation XXV of 1802 and certain other regulations "were not meant to define, limit, infringe or destroy the actual rights of any description of land-holders or tenants; but merely to point out in what manner tenants might be proceeded against in the event of their not paying the rents justly due from them." The rights of the ryots in regard to their lands were not altered by the passing of the regulation. The mutual relationship and rights of the ryots and of the Zemindar were recently explained in the case of *Venkatanarasimha Naidu v. Dandamudi Kotayya*¹. It was there pointed out that there is no substantial analogy between an English tenant and an Indian ryot for the simple reason that the rights of the ryots, in most cases, came into existence not under any letting by the Government of the day, or its assignees, the Zemindars etc., but independently of them. This view was further developed in the case of *Cheekati Zemindar v. Banasooru Dhoru*². In the case of *Venkatanarasimha Naidu v. Dandamudi Kotayya*¹ it was also pointed out that the interest in the land is divided into the two main heads of the *Kudivaram* interest and the *Melvaram* interest, and that the holder of the *Kudivaram* right, far from being a tenant of the holder of the *Melvaram* right, is really a co-owner with him. The *Kudivaram* right originated in priority of effective occupation and beneficial use of the soil, and the claim of Government and the assignees of

1. I. L. R., 20 M. 299.

2. I. L. R., 28 M. 818.

Government, was always, in these parts, to a share in the produce raised by the ryots. Lastly, it was pointed that "in essence there is no difference between a ryot holding lands in a Zemindari village and one holding lands in a Government village," and that in both cases the ryot "in the absence of proof of contract, or of special or local usage to the contrary, is entitled to occupy his lands so long as he pays what is due and if he should commit any default in this or other respect, until he is evicted by the processes provided by law."

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In the present case the defendants are admittedly the holders of the *Kudivaram* right in perpetuity. There is no suggestion that they derived their title from the Zemindar or that the ordinary *Kudivaram* right is limited, in their case, by any contract, or special or local usage. It is obvious that in these circumstances, it is misleading to speak of the Zemindar as the owner or proprietor of the soil in the sense in which an English landlord is the proprietor of the soil and to say that the trees growing on the soil must belong to the Zemindar as the owner of the soil. Rather should we say that the ryot, as the holder of the permanent right to occupy and cultivate the soil is the owner of the soil, so far, at least, as the title to the produce of the soil, whether ordinary crops or trees, is concerned. No doubt, in many parts of the country the Zemindars are entitled by custom to a payment on account of certain classes of fruit trees such as mangoes, palmyras and the like, and this is in accordance with the principle that the holder of the *Melvaram* right is entitled to a share in the produce, in the fruit raised by the holder of the *Kudivaram* right. By an extension of the same principle, the Zemindar is sometimes entitled by custom to a share in the profit made by the sale of timber, and it may even be that in some places he is entitled by custom to a share in the profit made by the sale of small trees, such as *babul*, which are used chiefly for firewood, though so far as our experience extending over some thirty years goes, this is very rare. But such a right, resting on custom is altogether different from what the plaintiffs claim in this suit, viz., that apart from custom and contract, they are, by law, entitled as Zemindars to the ownership of all trees growing on the land even of the permanent occupancy ryots of the Zemindari. We have no hesitation in holding that this claim is not supported by any law, and that it is opposed to correct fundamental conceptions of their rights and those of the occupancy ryots in their Zemindari.

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The case of the true tenant in the English sense, that is, of the man who holds by a title derived from the landlord, may, of course, be very different, especially in the case of short leases and of trees in existence before the letting began. In one of the cases quoted by the Subordinate Judge (*Appa Rau v. Ratnam*¹) the leases were for three years only, and this court naturally held that "*prima facie* a tenant would not be at liberty to cut down fruit trees on the holding" especially as there was evidence of a recognized custom to the same effect, and the court added, "it is shown that the prohibition does not extend to shrubs and small trees which are usually at the disposal of the tenant for the purposes of his holding." In the other case quoted by the Subordinate Judge (*Appa Rau v. Narasanna*²) it does not appear that the ryots had permanent occupancy rights, and [apparently a tax on the trees had previously been payable to the Zemindar. In these circumstances, the observation of Parker, J., that "*prima facie* a tenant has no right to cut down trees without his landlord's permission" cannot be regarded as a decision opposed to the views we have set forth above. The courts below have also relied on a series of judgments of the District Court in regard to other defendants in other villages of the Zemindari, Exhibits C, D, E, F, G and H. Two of these (Exhibits C and F) maintain the rights of the Zemindar to trees grown on the tank bunds and waste lands of the Zemindari. In regard to these waste lands the Zemindar, is, no doubt, the proprietor, by virtue of Regulation XXV of 1802, and his claim to the trees growing on the waste lands was rightly allowed; but they have no bearing on the rights of ryots to trees growing on their own pattah lands. In the other cases the District Court proceeded on the same view of the effect of Regulation XXV of 1802 which we have now shown to be incorrect. The present defendants were not parties to those suits, and are not bound by the decisions.

In the view we have taken, it is not necessary for us to decide on the effect of Exhibit I, on which the defendants rely as a bar to the plaintiffs' suit.

In the result we set aside the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

1. I. L. R., 13 M. 249.

2. I. L. R., 15 M. 47.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

The Secretary of State for India in Council
represented by the Collector of Chingleput ... Appellant*
(Defendant).
v.

Kasturi Reddi Respondent
(Plaintiff).

Darkhast rules—Jurisdiction of Civil Courts—Preferential claim—Waste lands—The Secretary of State v. Kasturi Reddi.
Officers empowered to grant—Public Agents—Distinction between public and private agents—Scope of authority—Proposal and acceptance—Mistake &c—Validity of grant.

Per Bhashyam Aiyangar, J. :—

A plea that Civil Courts have no jurisdiction to take cognizance of orders passed by the Revenue Officers under the Darkhast rules is unsustainable.

*Collector of Salem v. Rangappa*¹ followed.

Civil Courts have no jurisdiction to determine whether any person has any preferential claim, against the Crown, to the grant of land to him under the Darkhast rules. *Subbaraya v. the Sub-Collector of Chingleput*² referred to.

Quære :—Whether such claim can be recognised by the Civil Courts in the case of mirasi villages.

A claim by a person that a valid grant has been made to him under the Darkhast rules by an officer on behalf of the Crown and that such grant is binding on the Crown and persons claiming under the Crown is cognizable by the Civil Courts.

*Collector of Salem v. Rangappa*¹ followed.

The Statutes, Acts and Regulations dealing with Crown grants considered.

The various officers specially empowered by the Darkhast rules to dispose of Crown lands are agents appointed by the Governor-in-Council in their official capacity by executive orders, and the acts of such officers within the scope of their respective authorities are binding upon the Crown as if such acts were done by the Governor-in-Council himself.

In the case of a private agent, the principal is bound by his agent's acts and declarations, even where they are not authorized by the principal, as the latter is liable to the extent of the power he has *apparently* given to his agent. But in the case of public agents, the Government is liable only to the extent of the power it has *actually* given to its officers (the agents.)

Story on Agency, S. 307 (a) and *Collector of Masulipatam v. Cavalry Venkata Narayanappa*³, referred to.

The action of a Tahsildar (including a Deputy Tahsildar), Divisional Officer, Collector, and the Board of Revenue is not subject to any control other than that

* S. A. No. 1203 of 1900.

25th April 1902.

1. I. L. B., 12 M. 404. 2. I. L. B., 6 M. 303. 3. 8 M. I. A. 529.

The Secretary specially provided for by the Darkhast rules, viz., that of one appeal from any of the officers in the District to another officer in the District or to the Board of Revenue. A grant of land made by any one of such officers within the scope of his authority is subject only to one condition, i. e., it may be revoked or annulled by an officer of a higher grade on appeal preferred to him.

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When the proposal of an applicant for waste land is accepted by an officer duly authorized in that behalf by the Darkhast rules and the acceptance is duly communicated to the applicant, there is a valid contract for the disposal of the land which cannot be revoked or annulled by the officer who made the contract or by his successor in office or even by the Governor-in-Council, unless the contract is procured by fraud, misrepresentation, or mutual mistake as to any matter of fact essential to the agreement.

Where once a valid grant is made, the title of the grantee immediately vests and it is not essential for such vesting that a patta should be issued in the grantee's name or that the Government should put the grantee in possession.

Per Moore, J. :—

When in accordance with the Darkhast rules, a grant of land is made by a Revenue official authorised under such rules to make the grant, it is not open to the Government or to any subordinate acting on its behalf to cancel the grant and refuse to make over the land to the grantee and Civil Courts will be competent to give a decree against the Crown declaring the grantee's right to the land.

*Kullappa Naik v. Ramannajachariar*¹ and *Collector of Salem v. Rangappa*² followed.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 16 of 1900 presented against the decree of the Court of the District Munsif of Trivellore in O. S. No. 339 of 1899.

The Government Pleader (E. B. Powell) for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Bhashyam Aiyangar, J.* :—This is an appeal preferred on behalf of the Secretary of State for India in Council and the admitted facts of the case so far as they are material, are as follows :—

The land in question (Survey No. 159) lying in the non-mirasi village of Santavelur, in the Chingleput District (measuring 116-30 acres,) and assessed at Rs. 43-10-0, has been classed as 'assessed waste' in the Settlement Register. The respondent and one Srinivasulu Reddi, both being resident ryots of the said village, were the competing applicants before the Deputy Tahsildar of Satyavedu, in whose territorial jurisdiction the said village is situate, for

1. 4 M. H. C. R. 429.

2. I. L. R., 12 M. 404.

obtaining the land, on the ordinary ryotwari tenure subject to the payment of the said assessment. The Deputy Tahsildar passed an order assigning the land to Srinivasulu Reddi in preference to the respondent. Against this, the respondent preferred an appeal to the Deputy Collector in charge of the Trivellore Division in which the said village is comprised and that officer by his proceedings (Exhibit H), dated 25th June 1896, cancelled the assignment in favour of Srinivasulu Reddi and assigned the whole extent of Survey No. 159 to the present respondent, (who, it is recited in the proceedings, agreed to pay up the full assessment) and communicated the same to the Deputy Tahsildar, who by his order Exhibit (J), dated 29th July 1896, communicated it to the Munsif and Karnam of Santavelur, directing them to register the whole extent of Survey No. 159 to the account of the respondent. Against the order of the Deputy Collector, Srinivasulu Reddi preferred an appeal to the Collector of the District which was dismissed on the 10th August 1896 (Exhibit L) on the ground that he saw no reason to interfere. While the said appeal was pending before the Collector, certain ryots of the village, by a petition (Exhibit I), dated 30th July 1896, represented to the Collector that if the land be assigned on Darkhast, it will entail great hardship by depriving 'several cattle of their resource of water during the hot season' and prayed that the assignment of the same may be cancelled. The Collector by his endorsement thereon, dated 14th August 1896, forwarded the same for report to the Deputy Collector, who, in his turn, by endorsement, dated 27th August 1896, forwarded it to the Deputy Tahsildar for early report. That officer submitted a report (Exhibit II), dated 6th October 1896, stating that the land was useful 'to a large number—about 3,000,—of the cattle of the village,' that the 'villagers turned out *en masse* and bitterly complained against the assignment of the land as it was used by them as a grazing ground, and that, in his opinion, the prayer of the petitioners, that the land should be reserved for communal purposes was a reasonable one. With reference to this report made by the Deputy Tahsildar, the Collector on the 23rd October 1896, observed that the Deputy Collector "may revise his order as he thinks fit, in the light of the facts now before him" and by endorsement (Exhibit V), dated 4th February 1897, referred the petition of the ryots

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to the Deputy Collector for disposal. The Deputy Collector who was the successor in office of the Deputy Collector who had made assignment of the land to the respondent—by his proceedings (Exhibit VI), dated 25th February 1897, cancelled the assignment and directed the Deputy Tahsildar to submit the necessary application for transferring it to grazing ground poramboke. The village officers had not formally placed the respondent in possession of the land, nor had any patta been issued to him. He, however, appears to have taken possession of the land himself and as an attempt was made by the Revenue Officer to levy from him what is styled a penal assessment," he brought this suit for a declaration of his right to the land.

On behalf of the Secretary of State for India in Council, a written statement was filed contending that "the Civil Courts are not competent to take cognizance of the orders passed by Revenue Officers under Darkhast rules" and that the land claimed by the respondent 'has not been handed over to the plaintiff nor has patta been issued to him' and issues were framed with reference to these contentions.

In my opinion these contentions are entirely beside the point, —the real question in the case being, whether the respondent has, as against the Crown acquired a valid title to the land. If he had so acquired title, he has a right to possession and it is perfectly immaterial whether the land was delivered to him by the Revenue Officers or without such delivery he entered in possession of the land. It is equally immaterial whether a patta was issued to him or not. A reference to the form and wording of a patta (see 'Revised Forms of village accounts,' p. 57; and Board of Revenue (Revenue Settlement, &c.) Proceedings, No. 342, 11th July 1900, page 4) will show that as correctly characterised by the District Judge, it is in the nature of a mere bill and is not, nor does it purport to be in the nature of, a grant or conveyance (See *Freeman v. Fairlie*). He is entitled to specific performance of the contract, if there was a valid contract binding upon the Crown and he can claim the issue of patta if necessary. The Deputy Collector, after assigning the land to the respondent, directed the village officers through the Deputy Tahsildar to register the land in respondent's name. I presume that this is the

registration of proprietors of land contemplated by Regulation XXVI. of 1802. Whether this direction was given effect to, by actually entering respondent's name in the village register as proprietor of Survey No. 159, does not appear. But that is equally immaterial, if the assignment be binding upon the Crown and the respondent can, if necessary, take steps to enforce the registry of the land in his name under Regulation XXVI of 1802.

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The solution of the question involves the following issues :—

(1). Whether the Deputy Collector, the Divisional Officer who, it is alleged, made the grant, was competent to make a grant which would bind the Crown.

(2). Whether it was competent to him or to his successor in office, to annul and revoke such grant.

(3). Whether, if he could not do so of his own accord or on application made to him, it was competent to him to do so by reason of the Collector having authorised him to revise his order of assignment in the light of the facts then brought to notice.

The plea on behalf of the Crown that the Civil Courts have no jurisdiction to take cognizance of orders passed by the Revenue officers under the Darkhast rules is altogether untenable (*Collector of Salem v. Rangappa*¹). It may be that no one can advance in a Civil Court any claim against the Crown or any one claiming under it, to the grant to him, under the Darkhast rules, of land for which he has applied to the Revenue authorities under those rules (*Subbaraya v. The Sub-Collector of Chingleput*²). Whether any such claim can in certain cases be taken cognizance of by Civil Courts in what are styled 'mirasi' villages, need not be considered in this case, for the village in question, though it is now in the District of Chingleput, is admittedly a 'non-mirasi' village. But when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the Darkhast rules does not affect the jurisdiction of Civil Courts to determine whether a grant has been made which would bind the Crown or any one claiming under it subsequent to such grant (*Collector of Salem v. Rangappa*¹).

1. I. L. R., 12 M. 404.

2. I. L. R., 6 M. 303.

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I shall, therefore, now proceed to consider the legal basis on which such grants stand and the bearing which the so-called Darkhast rules have on the question. The law applicable to the subject is contained in the following statutes: 21 and 22 Vict. Ch. 106, Ss. 39 and 40; 22 and 23 Vict. Ch. 41, Ss. 1 and 2; 32 and 33 Vict. Ch. 29, S. 1; 33 and 34 Vict. Ch. 59, Ss. 1 and 2; India Act XV of 1895 (Crown grants). Ss. 39 and 40 of 21 and 22 Vict. Ch. 106 vested all lands and hereditaments and other real and personal estate of the East India Company, including such as may thereafter be acquired, in the Crown, to be applied and disposed of for the purposes of the Government of India and empowered the Secretary of State in Council to sell and dispose of the same, as he may think fit, the necessary conveyance and assurances being required to be made by the authority of the Secretary of State in Council under the hands and seals of three members of the Council. This provision which restricted the authority to sell and dispose of all real and personal estate vested for the time being in the Crown, to the Secretary of State in Council alone, was found to be extremely inconvenient in an administrative point of view, and it was, therefore, enacted by Section 1 of 22 and 23 Vict. Chap. 41 that the Governor-General of India in Council, the Governors in Council of Fort St. George and Bombay, respectively and the Lieutenant-Governor of North-Western Provinces or any officer for the time being entrusted with the Government, charge or care of any Presidency, Province or District in India, may, subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting shall from time to time prescribe, sell and dispose of all real and personal estate whatsoever in India for the time being vested in the Crown, within the limits of their respective Governments, provinces or districts and to enter into any contracts whatsoever within the said respective limits for the purpose of the Government of India. Section 2 prescribed the form of any contract, deed or other instrument, which they may enter into and the mode of executing the same.

As this form was not adopted in regard to the title-deed issued by the Inam Commissioner in the Presidency, a special statute 32 and 33 Vict. Ch. 29 was passed validating the same.

Section 1 of that statute—which is now spent—runs as follows:—“No title-deed for Inam lands issued by the Inam Commissioner in the Presidency of Fort St. George up to the date of the passing of this Act shall be deemed invalid on the ground that such deed is not expressed therein to have been executed by order of the Governor-in-Council, or that it is expressed to have been executed on behalf of the Governor-in-Council of Fort St. George, instead of on behalf of the Secretary of State for India in Council; and all such title-deeds shall be read and have the same effect, as if they were expressed to have been executed by order of the Governor-in-Council and on behalf of the Secretary of State for India in Council.” As it was discovered that the objection to which the Inam title-deeds were open was equally applicable to several other clauses of deeds, contracts and instruments made for the purpose of disposing of real and personal estate in India vested in the Crown and for other purposes, a general statute (33 and 34 Vict. Ch. 59) was passed validating such contracts, deeds and instruments and authorising the Governor-General, by resolution in Council, from time to time, to vary the form of execution prescribed by 22 and 23 Vict. Ch. 41 and to empower such authorities as to him may seem expedient, to vary it within the respective limits of their local jurisdiction.

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The expression “or any officer for the time being entrusted with the Government charge or care of any presidency, province or district” occurring in section 1 of 22 and 23 Vict. Ch. 41 has been construed in practice as including only Lieutenant-Governors and Chief Commissioners and not ‘District Officers in the special Indian sense’ [Ilbert, (Government of India : page 171, S. 33 (4) a)]. The authority conferred upon the Governor-General by S. 2 of 33 and 34 Vict. Ch. 59 to vary the form of execution and to empower local authorities to vary the same within the respective limits of their local jurisdiction, appears to have been exercised by the resolution of the Government of India, in the Home Department of March 28, 1895 [Ilbert, ‘Government of India’ p. 172, S. 33 (4) (d)] though ‘a copy of this resolution is not accessible.’ Though the Government of India and Local Governments were empowered by 22 and 23 Vict. Ch. 41, to sell and dispose of all real and personal estate whatsoever in India, for the time being vested in the Crown, yet it will be noted that the exercise of such power

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is made subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting shall from time to time prescribe. The provisions or restrictions which may be so prescribed are really in the nature of *statutory bye-laws*, which if infringed by the Government of India or any Local Government, will invalidate, as against the Crown, the disposal of such real or personal estate. It appears that such provisions or restrictions have been prescribed by the Secretary of State in Council, though authentic copies of the same are not available and they do not seem to have been published in the official gazette nor in the two volumes of 'Local Rules and Orders.'

It is, however, admitted by the Counsel for the Crown that if the grant in question is regarded as made by or on behalf of the Governor-in-Council of Fort St. George, it does not transgress any of such provisions or restrictions and that disposals of land—*of whatsoever value*—under the Darkhast rules are exempted from such provisions or restrictions. It is also admitted, with reference to the provisions of 33 and 34 Vict. Ch. 59 and the resolution of the Government of India (dated 28th March 1895 already referred to) that disposals of land, under the ordinary Darkhast rules, need not be made by deed, contract or other instrument made and executed in any particular form. There can hardly be any doubt that all waste lands, whether assessed or otherwise, are, within the meaning of Ss. 39 and 40 of 21 and 22 Vict. Ch. 106, "real estate vested in the Crown, in trust for the purposes of the Government of India," and that assignment of the same, under the Darkhast rules, whether on payment of a premium or price or without it, subject to the payment of assessment, is, within the meaning of the above statutes, "sale or disposal of real estate for the time being vested in the Crown," as much as Inam title deeds, releasing the reversionary rights of Government in the Inam lands are, within the meaning of the said statutes, 'disposal of real estate vested in the Crown' and that such sale or disposal, in order that the same may be binding upon the Crown should comply with the provisions of the said statutes. The Crown Grants (India) Act VII of 1895 exempts Crown grants from the operation of the Transfer of Property Act (1882) and S. 17 (j) and 90 (d) of the Indian Registration Act (1877) exempt from registration, "grants of immoveable property by Government" and "all documents pur-

porting to be or to evidence grants or assignments by Government of land or of any interest in land.”

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Having regard therefore to the *two admissions* above referred to, made by the Counsel for the Crown and the provisions of the Crown Grants Act and the Indian Registration Act, the question for consideration is reduced to this—whether in fact a grant or assignment has been made to the respondent, of the land in question by or under the authority of the Governor-in-Council of Fort St. George. The respondent does not contend that the grant has been made on behalf of the Governor-in-Council, by a person duly authorised in that behalf by the Governor-in-Council and that therefore it is as valid against the Crown, as if it had been made directly by the Governor-in-Council. The question, therefore, is narrowed to this—whether a grant purporting to be made under the Darkhast rules by an officer empowered to make such a grant under those rules can be regarded as one made by a person authorised in that behalf so as to give it the same validity as if it was made by the Governor-in-Council himself. It is admitted that the Darkhast rules which purport to be published in the standing orders of the Board of Revenue have all been made with the previous approval and sanction of Government, though unfortunately no authentic record of these rules and of the sanction of Government thereto is available, so that one may be sure whether what appears in the standing orders is a *verbatim* edition of the rules or merely a summary thereof and whether some of them are simply interpretations of the rules or amendments thereof made with the sanction of Government.

The only portion of the rules with which the courts need concern themselves are those which define the officers *competent* to make assignments of land, the *extent* of their authority including the *description* of lands which the said officers may respectively dispose of under the Darkhast rules and the *degree of control* by a *higher grade officer* to which the exercise of such authority is *subject*; and so far as the present case is concerned, there can be no doubt that the officer under whose grant the respondent claims, was competent to make the grant and the land which he granted—*i. e.*, assessed waste land—was of a description which he was authorised to grant on Darkhast. The bulk of the Darkhast rules, which are

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in the nature of instructions issued by the Government to the various officers concerned, as to the principles which should *guide* them in entertaining or rejecting applications for grant of various descriptions of land and determining to which of several competing applicants the grant should be made, if at all, and the *procedure* to be adopted by them, do not concern the Civil Courts (*Periya Royalu Reddi v. Royalu Reddi*¹).

In the course of argument, I put to the Counsel for the Crown the question as to whether it was his contention that the Governor-in-Council could not, in any particular case or class of cases, lawfully delegate to any of his subordinate officers the power of disposing lands vested in the Crown, and I also asked him whether any periodical returns of alienations of lands under the Darkhast rules, were made to Government for confirmation. He stated that his contention only was that until there is delivery of possession by the Revenue authorities and the patta is issued, there is no valid grant and that the assignments made in the Darkhast rules are not made subject to confirmation by Government. It must be admitted that there is no statutory provision authorising the Governor-in-Council to delegate his power in this respect to any subordinate officer. Such, however, has undoubtedly been the long-standing practice, and such delegation is essential in the class of cases contemplated by the Darkhast rules for the administration of the Executive Government of the Presidency, which is vested in the Governor-in-Council of Fort St. George by 3 and 4 William IV. Ch. 85, S. 56, subject under S. 69, to the control of the Governor-General of India in Council. In the case of release by the Crown of its reversionary rights in Inam lands, by enfranchisement of the same, the Governor-in-Council delegated his power to an officer specially appointed for the purpose by an Executive Act, i. e., the Inam Commissioner and when 32 and 33 Vict. Ch. 29 was passed to validate the title deeds issued by him in a form not in conformity with that prescribed by 22 and 23 Vict. Chap. 41, section 2, it was not considered that it was incompetent to the Governor-in-Council to delegate his powers to the Inam Commissioner as his agent and that it was, therefore, necessary to validate the same by a statutory declaration to the effect that such

1. I. L. R., 18 M. 434.

delegation was valid or that the action of the Inam Commissioner shall be deemed to have been ratified by the Governor-in-Council.

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In my opinion the various officers specially empowered by the Darkhast rules to dispose of Crown lands thereunder are really *agents* appointed by the Governor-in-Council in their official capacity by executive orders and are on the same footing as the Inam Commissioner who was appointed as the sole agent in regard to enfranchisement of inams. The authority conferred, under the Darkhast rules, upon the Board of Revenue, the Collector, the Divisional Officer and the Tahsildar including a Deputy Tahsildar, to dispose of various classes of Crown lands either in the first instance or on appeal made to them, not being conferred upon them by any statute or statutory rules, they can only be regarded as agents, generally or specially appointed by the Governor-in-Council in that behalf and their acts within the scope of their respective authorities are as binding upon the Crown as if they were done by the Governor-in-Council himself and as between the applicants and the Governor-in-Council, the latter should be regarded as a principal represented, under the general law, by such officers as his agents. The distinction as to the extent to which acts and declarations of a private agent bind his principal and those of public agents bind the Government is well pointed out by Story [in his 'Law of Agency', 9th edition (1882), section 307 (a)] in the following terms:—"In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter the principals are, in many cases, bound where they have not authorised the declarations and representations to be made. But in case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. Indeed this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents. [(Foot-note)—'By the law of agency at the common law there is this difference between individuals and the Government—the former are liable to the extent of the power they have

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apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers.'] And there is no hardship in requiring from private persons dealing with public officers, the duty of inquiry, as to their real or apparent power and authority to bind the Government." The same distinction was recognized by the Judicial Committee of the Privy Council in the *Collector of Masulipatam v. Cavalry Venkatânar-rainapa*¹ in the following terms :—

"Again the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority or if he exceeded that authority, when the Government in fact or in law directly or by implication ratified the excess."

Applying, therefore, the above principles of law to the present case, and extracting from the Darkhast rules that portion which really constitutes the power of attorney under which the various officers therein referred to act as the agents of the Governor-in-Council, so much as is relevant and applicable to the present case, the matter stands thus :—

Under Standing Order, No. 15, Tahsildars (including Deputy Tahsildars acting within their own division,) may ordinarily grant unoccupied assessed lands to applicants on their own authority subject to an appeal to the Divisional officer, unless such land falls under one or other of the classes specified in clauses 1 to 14 of paragraph 2. The land in question is, as already stated, unoccupied assessed land, and it is not the case for the Crown that it falls under any of the exceptions above referred to. The Deputy Tahsildar rejected the respondent's application and granted that made by Srinivasulu Reddi, subject to the result of an appeal which under paragraph 13 of the above order lies to the Divisional officer against the action of the Tahsildar in rejecting the respondent's application and granting that of Srinivasulu Reddi. The said paragraph 13 has to be read as part of the power of attorney, and its legal effect is materially to qualify the authority conferred upon an inferior agent (Deputy Tahsildar) by subjecting the exercise of that authority to the control of a superior agent (Divisional

officer) who in the event of the applicant being dissatisfied with the action of the inferior agent and applying to him by way of appeal, is authorised to dispose of the land to which the application relates. Paragraph 13 expressly provides that no second appeal shall lie from a Darkhast decision. If the application was originally made to a Tahsildar or Deputy Tahsildar, his action with reference thereto is liable to be superseded by an appeal to the Divisional officer whether such Divisional officer be the Collector of the District or an Assistant or Deputy Collector. In cases in which the original application may be made to the Divisional officer himself, an appeal will lie to the Collector if the Divisional officer be an Assistant or Deputy Collector or to the Board of Revenue if the Divisional officer be the Collector himself. The action of the officer to whom the appeal lies is final and binding upon Government if his act were within the scope of his authority. The power of attorney not providing for further control by a still higher agent, neither the Collector nor the Board of Revenue can set aside a grant made by the Divisional officer on appeal, and it will bind the Crown if it were within the scope of his authority.

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Neither Regulation I of 1803 (Board of Revenue) nor Regulation II of 1803 (Collectors), nor Regulation VII of 1828 has any bearing upon the question. S. 9 of Regulation II of 1803 empowers Collectors to superintend and control, under the orders of the Board of Revenue, all persons employed in the administration of the public revenue as far as such superintendence and control may relate to the executive administration of the revenue "*under the Regulations now enacted or hereafter to be enacted.*" S. 44 provides that Collectors shall not in any case authorise alienation of land without authority from the Board of Revenue, and S. 42 of Regulation I of 1803 virtually prohibits the Board of Revenue from making or confirming alienations of land without the authority of the Governor-in-Council. I do not pause to ascertain the provisions of the Company's Charter Act then in force bearing upon the disposal of lands and hereditaments vested in the East India Company, (*vide* Ss. 1 and 2 of 3 and 4, William IV, Chap. 85). Under S. 3 of Regulation VII of 1828 Subordinate and Assistant Collectors in charge of a particular division of a district are authorised *ex officio* to exercise, within the division under their charge, all the powers granted to Collectors by '*the Regulations*

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now in force or that may be hereafter enacted. Unless the contrary shall be expressly declared in any Regulations, the Collectors are also authorised to delegate any of the powers granted to them by *any Regulation now in force or that may be hereafter enacted* to any of their subordinates or assistants in charge of a division, beyond the limits of the division under his charge. And it further provides that the proceedings of Subordinate and Assistant Collectors *acting under the preceding clauses* of the section shall be subject in all cases and in the fullest manner to the superintendence, control and revision of the Collector, etc., (the italics in the above are mine), and it will be noted that the powers of Collectors above referred to which may *ex officio* be exercised by any Divisional officer and which may be delegated by the Collector to any Subordinate or Assistant Collector under him are *statutory powers* and not powers which may be conferred by Government by *executive* acts and the proceedings of Subordinate and Assistant Collectors, which in the fullest manner are subject to the superintendence, control and revision of the Collector, are proceedings held by such Subordinate and Assistant Collectors in exercise of the *statutory powers* above referred to, either *ex officio* or by delegation from the Collector and not proceedings held by them in exercise of powers specially conferred upon them by an *executive order* of the Governor-in-Council or other authority. It is therefore clear that in the exercise of the authority conferred by Government under the Darkhast rules on a Tahsildar (including a Deputy Tahsildar), Divisional officer, Collector and the Board of Revenue, their respective action in the disposal of lands under these rules is not subject to any control other than that specially provided by the Darkhast rules, by way of one appeal from any of the officers in the District to another officer in the District, or, to the Board of Revenue as the case may be.

- Paragraph 11 provides that orders passed in Darkhast cases should at once be communicated by the Tahsildar to all
- the parties concerned, and paragraph 14 provides that when an appeal is admitted the admitting authority shall forthwith send a notice to the officer whose decision is appealed against,
- informing him of the fact and instructing him to withhold registry of the land until the appeal has been disposed of, or if already ordered, such registry will be only considered as

conditional till the appeal is disposed of. Some stress was laid by the Counsel for the Crown upon the concluding portion of paragraph 14 which runs as follows :—"It should be distinctly understood that registry ordered by subordinate officers will be considered only conditional and that it will be liable to cancellation by a superior authority, if the grant is found to be irregular and unauthorised, although there may be no proof of fraud." This is nothing more than the explicit statement of the legal consequence of any of the officers authorised to dispose of land under the Darkhast rules acting beyond the scope of their authority, *i. e.*, that such grants will be invalid, and the mere fact that the land has been registered in the name of the applicant can give him no title as against the Crown. When the proposal of an applicant is accepted by an officer duly authorised in that behalf by the Darkhast rules and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud¹, misrepresentation, or mutual mistake as to any matter of fact essential to the agreement (Indian Contract Act, Ss. 17, 18 and 20). The grant, therefore, cannot be annulled or revoked by the officer who made the grant, his successor in office or even by the Governor-in-Council. Under the very terms of the authority conferred upon the various classes of officers, a grant of land made by any one of them within the scope of his authority is subject only to one condition, *i. e.*, it may be revoked or annulled by an officer of a higher grade on appeal preferred to him.

Applying these principles to the present case, the grant made by the Deputy Tahsildar to Srinivasulu Reddi in preference to the respondent being subject to the result of an appeal to the Divisional Officer by the respondent, the respondent acquired a valid title under the grant made to him by the Divisional officer in supersession of that made to Srinivasulu Reddi by the Deputy Tahsildar. He cannot be divested of that title by the Collector, Board of Revenue or even the Governor-in-Council, or by the Crown, and it is admitted that the grant was not the result of any fraud, misrepresentation or mutual mistake as to a material fact. As a matter of fact, a further appeal was preferred by Srinivasulu Reddi to the Collector against the action of the

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1. See *Collector of Rattinagiri v. Vyanlatrav N. Surve*, 8 B. H. C. (A. C). 1 :—*Ed.*

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Divisional officer and the appeal was dismissed. As I understand the Darkhast rules—as they appear in the Standing Orders of the Board of Revenue—the exercise of the authority of the Divisional officer in appeal is not subject to the result of a further appeal, whether the Divisional officer makes a grant refused by the Tahsildar or confirms one made by him. Even if, in the present case, the Collector had, instead of having dismissed the appeal, allowed it and annulled the grant made by the Divisional officer, that in my view would have been inefficacious. After he had dismissed the appeal preferred to him, he forwarded to the Deputy Collector for disposal, the petition preferred to him by the ryots of the village praying that the land should be set apart for communal purposes, and in doing so, he expressed it as his opinion that the Deputy Collector might, if he saw fit to do so, revise his former order in the light of the circumstances subsequently brought to notice by the Deputy Tahsildar.

The grant made by the Deputy Collector to the respondent on the 25th June 1896 took effect when it was communicated to him apparently on or about the same date, or at any rate when it was communicated to him through the village officers on the 29th July 1896, (Exhibit J) and they were directed to register the land in the name of the respondent in the land register of the village. The Collector's opinion that the Deputy Collector could revoke the grant, if he deemed fit to do so, is clearly erroneous and it cannot, therefore, confer upon the Deputy Collector an authority which he does not possess under the power of attorney which has to be extracted from the Darkhast rules. The cancellation of the grant by the Divisional officer and the assignment of the land by him for communal purposes of the villagers are void as against the respondent. If the land were really required for communal purposes of the ryots of the village, the only legal course open to Government is to acquire the same under the Land Acquisition Act.

The second appeal, therefore, fails and is dismissed with costs.

Moore, J. :—A Deputy Collector on appeal reversed an order of a Deputy Tahsildar and directed that certain assessed lands should be made over to the respondent (plaintiff) (Exhibit H, dated 25th June 1896). What appears to have been taken as a second appeal against this order was preferred to the Collector (*vide* Board's Standing Order 15, paragraph 13, which directs that there shall be

no second appeal in Darkhast cases), but it was dismissed by him on the 10th August 1896. (Exhibit L). The order of the Deputy Collector was communicated to the Subordinate Revenue authorities, and the Deputy Tahsildar on the 29th July 1896 sent an order to the head of the village directing that the land should be registered in the name of the respondent (Exhibit J). Subsequently representations were made to the Collector by the villagers that the land was required for grazing purposes and that it should be reserved, as poramboke. Enquiries were made and the Collector eventually gave the Deputy Collector permission to revise the order of his predecessor in the light of the facts that had subsequently been brought to notice (Exhibit IV). The Deputy Collector accordingly on the 25th February 1897 directed that the assignment of the land to the respondent should be cancelled, and ordered the Deputy Tahsildar to submit the necessary application for transferring the land to "grazing ground poramboke." The respondent on this preferred the present suit against the Secretary of State for India for a declaration of his right to the land that had been directed to be registered in his name. The District Munsif dismissed his suit, but the District Judge reversed his judgment and gave the plaintiff a decree as prayed for. The Secretary of State has preferred this second appeal.

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The main ground of appeal as taken in the memorandum is that "the rules of the Revenue Board drawn up for the guidance of Revenue officers in disposing of waste lands do not constitute rights enforceable in a Court of law." When the appeal was being argued the Government Pleader, however, also tried to show that the action of the Revenue authorities was not in reality unwarranted by the Darkhast rules. This contention, it is clear to me, cannot be maintained. The rules which are to be found in Standing Order 15 do not empower a Collector or Deputy Collector to act as has been done in the present case. The order of the Deputy Tahsildar declining to make over the land to the respondent having been set aside on appeal by the Deputy Collector, by whom a grant was made of it to the respondent, it was not open to a Deputy Collector, who subsequently succeeded that officer in charge of the division, even with the sanction of the Collector, to cancel the order granting the land to the respondent and direct that it should be transferred to poramboke. The terms of the standing

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order are clear as to this. The concluding portion of paragraph 14 of Standing Order 15 is as follows:—"It should be distinctly understood that registry ordered by Subordinate officers will be considered only conditional and that it will be liable to cancellation by a superior authority if the grant is found to be irregular and unauthorised although there may be no proof of fraud." Here the grant is not alleged to have been either irregular or unauthorised.

All that was found was that as the land was shown to be useful to the villagers for grazing their cattle it was inadvisable to grant it for cultivation. There having been a valid grant of the land it was not open to the Revenue authorities to cancel the grant on the ground that it appeared to be advisable to convert the land into poramboke. That no patta was issued in the name of the respondent for the land is immaterial. It having been ordered that the land should be registered in his name and the grant in pursuance of which registry was directed not having been shown to be irregular and unauthorised, the respondent acquired a valid title to the land which it was not in the power of the Revenue authorities to set aside.

The Darkhast rules are rules drawn up in the first instance by the Board of Revenue, but sanctioned by Government and promulgated under its authority. When, in accordance with those rules, a grant of land is made by the Revenue official authorised under them to make the grant, it would be impossible to hold that it is open to Government or to any subordinate acting on its behalf to cancel the grant and refuse to make the land over to the grantee, and when such a revocation of a grant is irregularly ordered by a Collector in violation of a distinct provision in the rules, the decisions in *Kullappa Naik v. Ramanujachariar*¹ and *Collector of Salem v. Rangappa*² are, in my opinion, sufficient authority for the proposition that it is open to a Civil Court to give the grantee a decree declaring his right to the land.

This second appeal should, in my opinion, be dismissed with costs.

1. 4 M. H. C. R. 429.

2. I. L. R. 12 M. 404.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Muhammad Kani Rowthan Appellant*
(Plaintiff).

Visvanatha Aiyar and others Respondents
(1st to 3rd Defendants).

Mortgage Suit—Prior mortgagees defendants—No question of priority—Res judicata between co-defendants Muhammad Kani Rowthan v. Visvanatha Aiyar.

There can be no *res judicata* as between co-defendants in a former suit unless the matter was in issue between the co-defendants *inter se* and not merely in issue between the plaintiff and the defendants in that suit

Where, therefore, in a suit for sale, the plaintiff, a puisne mortgagee, made the mortgagor and the prior mortgagees parties to the suit and obtained a decree for sale subject to the prior mortgages of all the defendant mortgagees, but there was no question of priority or of redemption dealt with in the suit or decree and one of the co-defendants brought this suit claiming priority as against other co-defendants.

Held that his claim was not *res judicata* by reason of any decision in the former suit.

Second Appeal from the decree of the District Court of Tanjore in A. S. No. 752 of 1899, presented against the decree of the Court of the District Munsif of Valangiman in O. S. No. 376 of 1898.

The plaintiff's case was that the plaint property belonged to one Abdul Khadar Rowthan, that the latter had mortgaged the same to the plaintiff, and that in discharge of this mortgage Abdul Khadar and his son Ibrahimsa Rowthan executed a fresh mortgage on the 28th July 1894. Ibrahimsa Rowthan and his father-in-law mortgaged this plaint property to Janakiammal on 5th April 1892, and the latter brought a suit upon her mortgage in O. S. No. 443 of 1895, and in execution of the decree obtained therein, the 1st defendant herein became a purchaser. The plaintiff alleged that knowing of this mortgage to Janakiammal he brought O. S. No. 195 of 1896 upon his mortgage, obtained decree and in execution of the same purchased the property himself. The plaintiff, therefore,

* S. A. No. 1243 of 1900.

24th July 1902.

Muhammad Kani Rowthan v. Visvanatha Aiyar. brought this suit against the 1st defendant and others for a declaration that the decree in O. S. No. 443 of 1895 and the proceedings therein did not bind the plaintiff and for possession of the property.

The 1st defendant's contention was that there was a mortgage executed to him by Abdul Kadir and his son on 25th January 1895, that he brought O. S. No. 324 of 1896 upon his mortgage, that Janakiammal and the plaintiff herein were impleaded in that suit as defendants and as holding prior incumbrances, that a decree was passed therein by which the plaint property was directed to be sold subject to the prior mortgages of Janakiammal and of plaintiff and that this judgment and decree were *res-judicata*. Both Courts upheld the 1st defendant's contention. Hence this second appeal.

P. S. Sivaswami Aiyar for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—Though in the former suit the question whether each of the defendants had mortgages upon the property was a matter which was in issue between the plaintiff and the respective defendants, there was no such issue as between the defendants themselves. So long as the interests of the 5th defendant were protected by the decree for sale being subject to his mortgage, it was entirely immaterial to him whether it was subject to other mortgages or not. There was no question of priority or of redemption gone into and the rights of the parties were not further dealt with than by making the decree for sale subject to certain encumbrances of which the 5th defendant's was one. In these circumstances there was no *res judicata* as between the 5th defendant and his co-defendants.

The decrees of both the lower Courts must be reversed and the suit remanded to the Court of First Instance for disposal according to law. The costs in this and in the lower appellate Court will be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present—Mr. Justice Davies and Mr. Justice Moore.

Maharaja of Vizianagaram ... Appellant*
(Plaintiff).

v.

Lingam Krishna Bhupati and others ... Respondents
(2nd, 3rd, 5th, 6th
and 7th Defendants).

Civil Procedure Code, Ss. 102, 103, 157 and 622—Suit part-heard—Adjourned date—Plaintiff and his pleaders absent—Order dismissing suit—Decree—Appeal—Mistake of judge as to legal powers—Failure to exercise a jurisdiction—Interference of High Court under S. 622.

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An order dismissing a suit for default of appearance of the plaintiff and his pleaders is not a decree and is, therefore, not appealable.

*Gilkinson v. Subramania Aiyar*¹ followed.

Where a suit is part-heard and is adjourned and the plaintiff and his pleader do not appear at the adjourned date of hearing, the proper procedure is that laid down in S. 157, C. P. C., and not that laid down in S. 102, C. P. C.

Under S. 157, C. P. C., the judge may either dismiss the suit for default under S. 102, C. P. C., or pass such other order as he thinks fit.

Where, therefore, the plaintiff, a minor, brought a suit against the defendants upon a mortgage and the suit being part-heard was adjourned to another date and the plaintiff's pleaders came late, and when the case was called on neither the plaintiff nor his pleaders were present, and the judge thinking that he had no other alternative than to pass an order of dismissal immediately dismissed the plaintiff's suit:—

Held, (1) that S. 157, C. P. C., applied to the case under which the judge had the option of dismissing the suit or passing any other order as he may think fit.

(2) that the judge was right in dismissing an application under S. 103, C. P. C., as there was negligence on the part of the plaintiff's pleaders.

(3) that the judge was wrong in thinking that he had no other alternative under the law than to dismiss the suit.

(4) that, by a mistaken notion as to his legal powers, he failed to exercise a jurisdiction vested in him by law and, therefore, the High Court could interfere under S. 622, C. P. C.

Appeals from the decree of the District Court of Vizagapatam in O. S. No. 7 of 1899 and from its order on C. M. P. 333 of 1900 in O. S. No. 7 of 1899.

* A. 17.
C. M. S. A. 12. } 1901
C. B. P. 40.

1st August 1902.

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Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the decree and judgment of the District Court of Vizagapatam in O. S. No. 7 of 1899.

V. Krishnaswami Aiyar, T. Rangachariar and S. Srinivasa Aiyangar for appellant in A. No. 17 of 1901.

V. Krishnaswami Aiyar, T. Rangachariar and C. R. Tiruvenkatachariar for appellant in C. M. S. A. No. 12 of 1901.

P. R. Sundara Aiyar and T. Rangachariar for appellant in C. R. P. No. 40 of 1901.

The Advocate-General (J. E. P. Wallis), P. S. Sivaswami Aiyar, V. Ramesam and K. Subrahmaniam Sastri for respondents.

JUDGMENTS :—*Davies, J.*—*In Appeal No. 17 of 1901.*—Following the decision of this Court in the case of *Gilkinson v. Subramania Aiyar*¹, I must hold that there is no appeal in this case and accordingly dismiss this appeal with costs.

In appeal against order No. 12 of 1901.—I agree with the District Judge that there was no sufficient cause for the non-appearance of the plaintiffs' Vakil in court when the case was called on for hearing and therefore dismiss this appeal with costs.

In Civil Revision Petition No. 40 of 1901.—In this case the Judge dismissed the suit under section 102 of the Code of Civil Procedure for default of the appearance of the plaintiff's Vakil at the time the case was called on. As the case was part-heard and this was an adjourned date of hearing, the appropriate section of the Code under which the Judge ought to have acted was section 157. Under that section he could either have dismissed the suit for default or passed such other order as he thought fit. The question is whether it was present to the Judge's mind when he dismissed the suit for default that he had the option of passing any other order that he thought fit. There is no indication that he did consider that he had an alternative course. The indications are that he did not. In the first place the wording of the order dismissing the suit, namely, that the "plaintiff not being present either in person or by Vakil, the suit is dismissed with costs,"

would indicate that the dismissal of the suit was a necessary consequence of the non-appearance of the plaintiff. It would seem to imply that there was no alternative. The further order of the Judge on the application to restore the case to the file contains the following paragraph :—8. "It cannot be seriously contended that the failure of the pleaders to appear is due to any other cause but negligence pure and simple. It is certainly hard on the plaintiff that his suit should be dismissed under these circumstances, but the provisions of the Procedure Code are strict, and I cannot see my way to putting the suit back." The Judge also remarks in para. 9, "I am constrained therefore, though, against my will, to dismiss the application with costs." Thus he deplores the rigour of the law overlooking the latitude it allowed him. This to my mind clearly shows that the Judge thought that the hardship done was not of his own doing but was attributable only to the law while as a matter of fact this was not so. He could have exercised his discretion and prevented the dismissal of the suit by passing some other order, and his language shows that he would have done so had he considered the provisions of section 157 of the Code.

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In the second place, the order passed by the Judge was certainly not an order that any reasonable Judge would have passed under section 157 of the Code. The plaint was that of a minor. The amount of the claim was about a lac of rupees. The suit was being fought step by step up to the date of its dismissal. Sir V. Bhashyam Aiyangar had journeyed from Madras to prosecute the suit, and its dismissal, in such circumstances, was a penalty upon both the Vakil and his client out of all proportion to the fault of the Vakil in being half an hour late at court. I am therefore satisfied that the Judge did not act under section 157 of the Code of Civil Procedure. He thereby failed to exercise the discretion vested in him by that section, in other words he failed to exercise a jurisdiction vested in him by law. We can, therefore, interfere with his order under section 822 of the Code, and for the reasons already stated I am of opinion that he ought not to have summarily dismissed the suit under section 102 of the Code as he has done. I would accordingly direct that it be restored to the file for disposal according to law on condition that Mr. D. V. Narasing Rao, Sir V. Bhashyam Aiyangar's junior in the case, do

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pay the costs of the day on which the suit was dismissed for default, he having undertaken before us to do so. What those costs were, will be taxed by the District Judge.

There will be no costs of this petition.

Moore, J.

Moore, J.:—Original Suit No. 7 of 1899 came on for hearing before the District Judge of Vizagapatam on the 24th October 1900 and was adjourned till the following day. On the 25th the Judge appeared in Court very shortly after 11 A. M., and this suit was called on but no one appeared for the plaintiff. The Judge waited some minutes and then dismissed the case by the following order: "Plaintiff not being present either in person or by Vakil, the suit is dismissed with costs." A short time afterwards the two pleaders for the plaintiff appeared in court, and a petition was presented to the Judge requesting him under section 103 of the Civil Procedure Code to set aside his order of dismissal. On the 15th November this petition was rejected as the Judge held that the pleaders had failed to show that they had been prevented by any sufficient cause from being present in court when the suit was called on for hearing.

Appeal No. 17 of 1901 is an appeal against the order of dismissal of the suit passed by the Judge.

Appeal against order No. 12 of 1901 is an appeal against the order of the Judge rejecting, under section 103 of the Civil Procedure Code, the petition requesting him to set aside his order of dismissal on the grounds that he in passing that order failed to exercise a jurisdiction vested in him by law and acted illegally and with material irregularity.

Following the judgment of a Bench of this Court, in *Gilkinson v. Subrahmania Aiyar*,¹ it must be held that there is no appeal against the order of the Judge in dismissing the suit.

Appeal No. 17 of 1901 is dismissed with costs.

As the Judge is clearly right in holding that the plaintiffs' pleaders completely failed to show that they were prevented by any sufficient cause from appearing when the suit was called on

1. I. L. R., 22 M. 221.

for hearing, appeal against order No. 12 of 1901 must be dismissed with costs.

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The Civil Revision Petition remains for consideration. There can be no question that when on the morning of the 25th October the plaintiff failed to appear in person or by pleader, the section of the Code under which the judge was bound to proceed was section 157. Under the powers given to him by that section it was open to him to dismiss the suit for default under section 102 or to make such other order as he thought fit. He might, for example, have ordered the hearing to be adjourned to the following day, making such orders as to the costs of the day as he thought fit. It is now urged in support of this petition that the wording of the two orders passed by the Judge show beyond all reasonable doubt that the existence of this section or the nature of the powers given to him under it were not present to Mr. Bell's mind when he passed his orders of the 25th October and the 15th November, that it is impossible to believe that, if he had duly considered the wide latitude granted to him under section 157 with respect to the order that he should pass when the plaintiff and his pleaders failed to appear, he would have passed the order that he did on the 25th October, and that such being the case, it should be held that he acted with material irregularity in dismissing the suit. After full consideration of the wording of Mr. Bell's two orders, I am of opinion that this contention is a valid one. The Judge has unfortunately not mentioned the sections under which he passed his order of the 25th October, but there are, as it appears to me, very strong grounds for holding that when he passed it he had section 102 alone in his mind and did not consider section 157. The former of these sections gives the court no option. If the plaintiff or his pleader does not appear the suit must be dismissed. The wording of the order leaves but little doubt in my mind that Mr. Bell considered that he had no option but to dismiss the suit. If he was conscious that he had the power of making such order as he thought fit, it is only reasonable to assume that he would have referred to this fact and given some reason for passing an order for dismissal in preference to any other order. It also appears to me to be difficult to believe that a Judge of experience, if he had duly considered the nature and extent of

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the powers conferred on him by section 157 could have arrived at the conclusion that it was just and equitable to dismiss a suit for a large sum of money on the sole ground that the plaintiff's pleaders on a morning when it is clearly shown that the weather was most inclement were a few minutes late in coming to court. • A consideration of the wording of the 8th paragraph of the order of the 15th November confirms me in the opinion that I have just expressed. Mr. Bell then observes that it was certainly hard on the plaintiff that his suit should have been dismissed under the circumstances, but that the provisions of the Civil Procedure Code were strict. This remark is perfectly true if section 102 alone is considered, but it is unintelligible if the Judge had the provisions of section 157 in his mind when he dismissed the suit, for the provisions of that section are, as has already been pointed out, by no means strict but give the Judge the widest possible latitude as to the order that he should pass. For these reasons I consider that I am bound to hold that the Judge passed his order without reference to the provisions of section 157, that he consequently failed to consider the extent of the option conferred on him by that section, and that he jumped to the conclusion that he was bound to dismiss the suit and in consequence passed an order doing so which, the wording of his later order shows beyond all reasonable doubt, he would not have passed if he had not been mistaken as to his legal powers under the Civil Procedure Code and taking this view of his action it follows that I must hold that in passing his order he failed to exercise a jurisdiction vested in him by law. The order of the Judge dismissing this suit must, therefore, be set aside under the powers given by section 622 of the Civil Procedure Code, and he must be directed to take the suit on his file on the terms mentioned by *Davies, J.*, in his judgment and proceed to dispose of it according to law. The parties will pay their own costs in so far as this petition is concerned.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—Lord Davey, Sir Ford North, Sir Andrew Scoble and
Sir Arthur Wilson.

16 W.N. 55.

Subramanian Chettiar ... Appellant.*

v.

Arunachalam Chettiar and others ... Respondents.

Evidence Act I of 1872, S. 92—Registration Act III of 1877, S. 17—Transfer of Property Act IV of 1882, Ss. 105 and 107—Permanent Lease—Collateral agreement—Monthly allowance to lessor—Personal obligation—Varthamanam—Admissibility of evidence—Registration—Assignment by lessor—All claims and demands now due owing or payable—Claims arising after assignment. Subramanian Chettiar v. Arunachalam Chettiar.

A collateral agreement by a person who obtains a permanent lease to pay the lessor a monthly allowance for some time before the permanent lease takes effect can be given effect to and proved and S. 92 does not exclude proof of the same.

Where the payment contracted for is a personal obligation collateral to the lease (not being rent) and is no charge on the property, a letter or varthamanam evidencing such agreement is not required to be registered either under Act III of 77, S. 17 or Act IV of 1882, Ss. 105 and 107.

An assignment by the lessor of all his property and all his effects and outstanding "now due and payable" under a trust deed does not include this personal obligation for two reasons—

- (1) the payment not being rent the right to recover the same does not pass with the Zemindary;
- (2) that the words "now due and payable" in an Indian document would only include claims existing at the date of the deed and that, therefore, claims arising after the date of the deed as in this case would not pass under the assignment.

Cohen, K. C., and G. A. H. Branson for appellant.

J. D. Mayne for respondents.

Cohen :—My Lords, in this case I am with my friend Mr. George Branson for the appellant. The facts are few. They lie in a small compass, and with your Lordships' permission I will read the appellant's case. It is an appeal against a decree of the High Court reversing the judgment of the Subordinate Judge at Madura, which judgment was a judgment for the plaintiff. The facts are that one Ramasami Chettiar, since deceased, the father of the defendant, was about to take out a lease from the Rajah of

* 9th July 1902.

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Ramnad. That Rajah was a descendant of some of the great Rajahs of India, owning a large Zemindary. "Before the documents constituting such lease were prepared and ready for execution, it was agreed between the said Ramasami and the said Rajah" &c., &c. [He then recited the oral agreement.] So it is clear there was an oral agreement made during the negotiations concerning the permanent lease and before the execution—"and on the fourth day of July 1895 the said Rajah executed a permanent lease of the villages" &c., &c. [Reads to the words, line 20] "and on the 5th day of July 1895 the said Ramasami executed to the said Rajah a counterpart of the said permanent lease." Those two documents will be found one on page 30 and the other at page 43 of the record. At page 30 is Exhibit A (that is the permanent lease by the Rajah of Ramnad to Ramasami); it states that it is a permanent lease executed on the 4th July between these two parties. Then it goes on to say, "the taluq of Hanumanthangudi of our samasthanam"—I believe that means estate, it is an expression often used in this record—"was let on Karunthalai lease under deeds, dated 11th January 1892 and 11th July 1892 for the period from Fasli 1301 to 1318"—that I believe would be 1911. The only important point is that these leases which were outstanding would not expire until after the expiration of the 10 years during which monthly payments were to be made, "the Jama (the receipts) of the villages attached to the said taluq and described in schedules A and B hereunto annexed, amounts to Rs. 63,466-4-6 for a fasli, calculated at the average income received by the samasthanam (estate) during the 10 faslis preceding the time when the said taluq was given on lease to the said lessees." Then I omit the next two paragraphs. It goes on to say "then the villages will come to the possession of our estate from Fasli 1319." That is long after the expiration of the ten years I have mentioned. "Whereas you have requested me to let to you the villages described in the said schedules" &c., &c. [Reads to the words line 40, page 30] "described in the schedules A and B annexed hereto on permanent lease." The next paragraph is not of any importance nor the next but one. "You shall from Fasli 1319, when the Karunthalai lease of the said Hanumanthagudi Taluq expires, pay to our samasthanam without objection the poruppu for the villages described in the said schedules A and B" and submit

accounts of road-cess" and so on "to our estate for every fasli from Fasli 1319," that is 1912. "In default of payment on the due date, you shall pay the sum with interest thereon at 1 rupee per cent. per mensem from the date of default. We shall have the right to recover the arrears of rent, road-cess and Mahamai, under Act VIII of 1865 according to law." Then there is a right to assign. I do not think there is anything more of importance :—

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Copy of the said document, and of an endorsement made by the said Rajah thereon on the 10th of July 1895 are as follows :—"They are copied and are to be found at page 54, Exhibit C." This long name is the name of the Rajah. The letter is written by Ramasami Chettiar. "You have let to me on permanent lease" &c., &c. [Reading down to the words] "of which default was made, with interest." The oral agreement was put in writing after the execution of the lease, and there was endorsed on it by the Rajah an endorsement which is to be found in Exhibit C, page 55. "The letter obtained in pursuance of the agreement entered into between me and M. R. Ry. Ramasami Chettiar Avergal, Zemindar of Devakottah, is herewith sent to the Huzur Kacheri Treasury for safe custody. This amount relates to my own allowance." That is rather important. "It does not relate to the allowance payable from the samasthanam." He is just executing a trust deed to which I shall afterwards direct attention. In that trust deed there was an allowance payable to him from the estate which he conveyed to the trustee. He says this allowance, or rather these monthly payments which are stipulated for in this document, "relate to my own private allowance, and not to the allowance payable from the estate."

Sir Ford North :—How is that evidence?

Cohen :—I think your Lordship will find it is evidence.

Sir Ford North :—A mere memorandum put by him on a document which he kept in his possession?

Cohen :—I shall have afterwards to direct attention to the trust deed, and in interpreting the trust deed you may look at all the surrounding circumstances.

Sir Ford North :—Not to a document which is not evidence?

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Cohen :—The trustee has nothing to do with Ramasami, but this will show what the intention of the Rajah was

Sir Ford North :—Is that admissible?

Cohen :—That I shall argue afterwards. It was not objected to, and I think I can shew that it was perfectly admissible. Then I go on to page 3, line 17. "Thereafter the said Ramasami having made default in payment of the said sum" &c., &c. [Reads down to the words at line 27] "and on his failure to pay the said instalments as they fell due." I will call him the plaintiff. That is at page 55 your Lordships will pardon me if I add something to the case. There are one or two facts to add. The facts are these. I refer to page 60, Exhibit J. This is addressed to the Head Shroff or officer of the Huzur Treasury. "The letter written and given" &c., &c. [Reads down to the words.] "It should be kept in the Treasury for safe custody."

Sir Arthur Wilson :—What was enclosed in this was the letter you have already referred to?

Cohen :—Yes. Then if your Lordships look at page 61, you will find that it was initialled by a gentleman whose name begins with "Na." That was on the 15th July, and then—and this is not an unimportant fact—it was handed back by the official acting for the trustee to the Secretary of the Rajah on the 30th November. Those facts are stated with tolerable clearness at pages 84 and 85 where the evidence of Ramasami (that is not the Ramasami, I will call him Aiyangar)—is set out "I am Sheristadar of the Ramnad Samasthanam."

Sir Andrew Scoble :—That is a Record-keeper or Head Clerk.

Now if your Lordships will turn to our case, page 3, line 17, it says: "Thereafter the said Ramasami having made default" &c., &c. [Reads down to the words] "under the said document of the 9th of July 1895" to the plaintiff. That assignment is to be found at page 55, Exhibit D. Whereas a Varthamana Kaduthasi (letter) was executed" &c., &c. [Reads down to the words] "and I shall have no concern in it." Notice of this assignment was given to Ramasami on the 9th of December. That your Lordships will find at page 56, Exhibit 27. "Whereas I have this day assigned over"

&c., &c. [Reads down to the words at line 23] "payable to me every month as stated in the said letter." Notice of the assignment was also given to the plaintiff; that is to be found at page 57. The plaintiff gives this notice in writing to Ramasami. "Whereas you have obtained a permanent lease" &c., &c. [Reads down to the words at line 18] "on the 9th of the respective month."

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Well then, Ramasami having made default in the payment of instalments on the 20th September 1897, this suit was instituted. The plaint is to be found in the 3rd page of the record: "By the instrument, dated 4th day of July 1895" &c., &c. [Reads down to the words at line 10, page 4] "on the terms and conditions of the document, dated 4th July 1895."

Lord Davey:—That is very much what you read before.

Cohen:—Yes, I think so. Then the notices are stated and that default was made in payment. Then the defence is—

Lord Davey:—That it is not registered.

Cohen:—That is one defence: that it is void in law not being registered. The defendant puts the plaintiff to the proof of the document * * * * and submits that the said document of the 9th of July 1895 not being duly stamped or registered cannot be admitted in evidence. "Then there is a dissertation of about 20 pages" in the judgment to show that the stamp objection was invalid. All that is entirely immaterial because according to Indian Law and according to English Law, you cannot take a stamp objection after a document has been once admitted by the Judge. In the Court of Appeal therefore it is not noticed.

Mayne:—I should not notice it.

Cohen:—You could not notice it.

Mayne:—Well then, I will not.

Lord Davey:—How do you deal with the registration?

Cohen:—That document requires no registration at all. That I think I can shew conclusively.

Lord Davey:—Then, what is the rest of the defence?

Cohen:—There is another defence. That is one ground taken by the High Court. The High Court held that this document containing as it does, as the High Court thought, one of the terms

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Lord Davey :—And they say this was part of the lease.

Cohen :—They seem to say so ; I will argue that point.

Lord Davey :—You say it is a collateral agreement made in consideration of your taking the lease.

Cohen :—Yes ; I think I can satisfy your Lordships on that point.

Lord Davey :—I suppose that is your point : that it is a collateral agreement.

Cohen :—That it is a collateral agreement entered into in consideration of the lease and not inconsistent with any terms of the lease. Moreover this permanent lease was to take effect as I said before, only after the expiration of the ten years during which the instalments were to be paid. I think, therefore, it is perfectly clear according to the authorities that I shall cite that this agreement if it really was made, was a valid agreement, and if it was a valid agreement it is clear it need not be in writing, because the Transfer of Property Act says no documents are required to be in writing except such as are specified. The lease must be in writing, that is the sketch of one argument on one of the two grounds of which the High Court proceeded.

Sir Arthur Wilson :—Did the High Court find that it was bad for want of registration ?

Cohen :—Yes, it is para 10. “This defendant submits” &c. [Reads para. 10 down to the words] “even if their claim be otherwise well founded.” So what they say is this. Even if this oral agreement is perfectly valid and constituted a debt due from the defendant to the Rajah, still you, the plaintiff, can have no right of action, because before that debt was assigned to you it was assigned by the Rajah to a trustee ; that is to say, the defendant in this case is setting up a *jus tertii* although at the commencement of the action he never received any notice of the assignment of the debt, and although he does not say that he is now defending this suit, to use the words of Lord Blackburn under the title, and by the authority of the assignee he is setting up a *jus tertii* although not

offering to pay the debt to the assignee, and although he never received any notice. Of course, in English Law the assignee would have priority because notice of the assignment was given to the debtor, whereas Ramasami had no notice of the assignment given by the trustee. So that according to the ordinary English Law, I suppose the notice of assignment would have the effect of giving priority to the person who gave notice of the assignment to the debtor.

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Sir Ford North :—But the point is—You the plaintiff have parted with your interest, and therefore you cannot sue me.

Cohen :—That is setting up a *jus tertii*.

Mayne :—Some one else can sue me.

Cohen :—I submit it cannot be done.

Lord Davey :—It is perfectly relevant to say : You the plaintiff having got the right and title to this money which you sue for they may be setting up a *jus tertii*. That is a legal defence.

Cohen :—Then I also say that according to the true interpretation of the deed this debt did not pass.

Lord Davey :—That is a very different thing.

Cohen :—There are really two questions in this case. The first is this, the Subordinate Judge referred to the evidence and indeed found that it was admitted on both sides that before the execution of this permanent lease and contemporaneously with the negotiations for the same, the oral agreement which I have already mentioned between the Rajah and Ramasami was come to, and in consideration of the Rajah granting to the latter the permanent lease Ramasami agreed to pay to the Rajah those monthly instalments. The learned judge did not believe Ramasami who was and who described himself as a money-lender, when he, with some boldness, asserted that the oral agreement was come to after the execution of the lease and that the agreement was come to only out of the kindness and gratitude he felt for the Rajah. The judgment on that point is to be found at page 137, line 17, nor was the story worthy of belief.

Lord Davey :—Had not you better read the judgment at length?

Cohen :—It is so very long I was trying to save your Lordships a great deal of trouble. I shall read very little of the judgment

Subramanian Chettiar v. Arunachalam Chettiar. indeed. The judge labours many points which I consider now to be immaterial. At page 137, line 17, he says, "The only issues which now remain to be considered &c., &c. [Reads down to the words at line 5, page 138]" his own testimony in part and the testimony of the Rajah.

Lord Davey.—I suppose the importance of this is on the question of registration. Why is it material whether he agreed to pay as a nuzzur on the execution of the lease or whether he did not?

Cohen.—It is only on account of one of the grounds on which the High Court decided against the plaintiff, namely, that the document ought to have been registered.

Lord Davey.—That is what I say. It is important on the subject of registration and on the consideration too.

Cohen.—If there was no consideration, no action could be brought upon it. [The learned counsel continued to read from the judgment at line 6, page 138, down to the words at line 33, page 138] "As a matter of favour to the defendant" even there is only one other passage which I wish to read and that is at page 139, line 27, "the subsequent conduct of the defendant" &c., &c. [Reads down to the words at line 36] "he is not in the habit of replying to lawyer's notices". I need not go on reading that, nor need I labour on this point: because I think it will be found that the High Court does not at all disagree with the inference which the Subordinate Judge draws from the evidence, namely, that this was an agreement which was made in consideration of a lease being granted. Perhaps I had better read the passage from the judgment of the High Court. The High Court seems to think that although that was the case it related so much to the lease that it ought to have been registered. The judgment of the High Court relating to this point is at the bottom of page 158, "The second point argued on behalf of the appellants is that the terms expressed in the document sued on is one of the terms of the lease, and that it is only upon the lease that a suit can be brought to recover a sum which is, in fact, a part of the rent. No action could be brought on this lease to recover this sum at all." In considering the point we must take it that the facts are as stated in the 3rd, 4th and 5th paragraphs of the plaint "so that the High Court assumes the facts to be, as the plaintiff has stated them in

the plaint" the case is not one in which by a subsequent arrangement" &c., &c., [Reads down to the words at line 10] the cases of subsequent agreement which have been cited have therefore no relevancy. I agree. According to the Transfer of Property Act S. 107, a lease such as was executed in the present case must be made by a registered instrument and a lease is defined as a transfer of immoveable property for a certain time, or for perpetuity in consideration of a price paid or promised.

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Lord Davey:—I do not say whether your point is good or bad, but they do not seem to have apprehended the point that it was a collateral agreement in consideration of the execution of the lease.

Cohen:—No. At line 4 they say:—In considering the point we must take it that the facts are as stated in the 3rd, 4th and 5th paragraphs of the plaint; so they admit the facts. They admit that the consideration was the execution of the lease. They admit that there is no term in the lease, which corresponds to this term. Still somehow or other because the lease must be in writing, and because this is something given in consideration of the execution of the lease therefore that must also be contained in a lease. I will cite one or two cases. I think the authorities are clear on the subject [the learned counsel read the remainder of the judgment of the High Court].

Lord Davey:—Suppose there was a premium paid on the granting of the lease, would not that have to be in the lease as a registered document?

Cohen:—If a premium was to be paid in consideration of the lease, the premium need not be contained in the lease at all, for this reason, I think the cases are clear on the subject. The lease must be in writing. It is not contended that the lease is invalid. If it were not intended to embody in the document which we call the lease, everything which was to be paid or done in consideration of the lease, then according to the cases both in equity and common law, it is not necessary that those things should be described or stated in the lease at all. It is a collateral agreement. In consideration of your executing the lease, I will pay you a premium of £ 100 or 1,000. No one can doubt, according to the authority, that an action would lie to recover it.

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Lord Davey :—It might be argued that that was just as much a part of the terms of the lease as the statement of what the rent is.

Cohen :—So it might be. That is not material. Of course I must make out that there is nothing in the oral agreement which is inconsistent with the lease. The Judges say, if you shew that certain things are not contained in the lease, but are contained in another document, there is no reason why effect should not be given to the former document.

Lord Davey :—There is the rabbit case.

Cohen :—Yes, there are several cases.

Sir Ford North :—Supposing you have to register your lease, could you leave the rent out of it altogether and put that in another document which is not registered?

Cohen :—I do not see why not.

Sir Ford North :—You might leave the parcels out of the lease in the same way I suppose.

Cohen :—Take the ordinary case of a deed. A lease must be by deed if it exceeds three years. Nobody has yet contended against it; but, on the contrary, it has been decided that if it has been agreed orally before that a premium is to be paid, effect will be given to that.

Lord Davey :—It is a very subtle distinction "I will not execute this lease" says the lessor "unless you agree to put down the rents" then he says "very well, I will put down the rents."

Cohen :—The rabbit's case is a very strong case.

Lord Davey :—That is a typical case. It requires a microscopical eye to see the difference.

Cohen :—The real difference seems to be this as laid down by Lord Chief Justice Erle and other Judges. You must clearly see that there is nothing in the oral agreement which is inconsistent with anything contained in the lease. If you find that the stipulation contained in the oral agreement relates to the matter which is provided for in the lease, then there might be a difficulty. There are, as Lord Davey said, a great many cases which are curious, to say the least.

Lord Davey :—Well, very fine.

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Cohen :—Yes, that difficulty does not arise. I submit in the present case, the lease was to take effect only about the year 1918 or 1919. It says nothing as to what was to be paid during the antecedent period. There is no provision at all made. Therefore that difficulty which does arise in the other case is clearly eliminated by the facts of the case and by the principle laid down by Chief Justice Erle in the case which I will cite in a moment when he says—and Lord Justice Bowen says exactly the same in another case—you must look to see whether the stipulation contained in the oral agreement was intended to be part of the provision contained in the lease. If you find that it is independent of the provisions actually contained in the lease, there is no principle at all which prevents you giving effect to the oral agreement.

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Sir Arthur Wilson :—This is much more like the first rabbit case than the second rabbit case. The first rabbit case was a collateral agreement not to keep down the rabbits during the term of the lease but to clear the rabbits once for all before the termination of the lease.

Cohen :—I will briefly direct attention to these cases.

Lord Davey :—To do something as a preliminary or a condition precedent to the lease being executed is one thing that I can understand.

Cohen :—I quite follow that the law seems to me to be very accurately stated in that excellent book, Leake on Contracts. I will cite the cases afterwards. It is often cited now as an authority. I am reading from page 162 of the 3rd Edition: "An agreement may be made contemporaneously with a written contract as part of the transaction, but without being incorporated with it, such agreement is then collateral to the written contract, and may be proved by extrinsic evidence. No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but nevertheless what is called a collateral agreement, where the parties have entered into an agreement for a lease, or for any other deed under seal, may be made in consideration of one of the parties executing the deed unless

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of course, the stipulation contradicts the terms of the deed itself.”
That is taken from a judgment of Lord Justice Mellish.

Lord Davey :—That is the second rabbit case.

Cohen :—Thus where, in a negotiation for a lease, the lessor promised that he would kill down the game during the term, but refused to make it a special provision in the lease, which reserved the game to the lessor, and in consideration of the promise the lessee executed the lease, it was held that there was a binding contract collateral to the lease, which might be separately proved and enforced. So where the lessor of a house promised that if the lessee would take a certain lease he would do certain repairs, and provide certain furniture, it was held that the promise operated as a distinct contract collateral to the written lease, and might be proved by parol evidence. My Lords, that is a general statement of the law as stated by Mr. Leake in his book.

Now I will cite two or three cases on the point. There is *Lindley v. Lacey*¹, Chief Justice Erle says at page 9 :—It is not necessary to go through the numerous cases. The question is, does it appear from the written instrument that it was meant to contain the whole that was intended to be binding between the parties? If so, nothing can be added to it. If this does not appear, then an agreement upon a distinct matter may be shewn to have been made orally and may be enforced. In *Harris v. Rickett*² such an oral agreement was made before the written agreement. In *Davis v. Jones*³ and *Wallis v. Littell*⁴ the oral agreement and the written agreement were contemporaneous. Whether the oral agreement precede or be contemporaneous with the agreement is of no consequence provided it be on a distinct collateral matter. What the plaintiff here said amounted to this “I will not enter into any contract with you until Chase’s matter is settled.” That is the statement which is so often cited from the judgment of Chief Justice Erle in that case. It has often been laid down, as your Lordships, of course, very well know, that the first question when a document is put in is, was it intended to be the agreement between the parties? It was laid down, your Lordships may perhaps remember, in so elaborate a way by Lord Blackburn in an opinion he delivered in the House of Lords in *Peak v. The North Staffordshire Railway Company*⁵. Was this document intended to be the

1. 34 L. J. C. P. 7. 2. 4 H. & N. 1. 3. 17 C. B. 625. 4. 81 L. J. C. P. 100.
5. 10 H. L. C. 472.

document embodying the agreement? If it was not, there is nothing to prevent your giving oral evidence. If it was intended to be the document embodying the agreement, then the ordinary rule is you can only look at that document itself. Well, now, let me apply that. In the same way if you come to the conclusion, as Chief Justice Erle mentions here, that a certain document was not intended to embody all the terms, if you see that it was not intended to embody all the terms, there is no earthly reason why you should not put in another document shewing what the other terms were or prove an oral agreement shewing what the terms were. That seems to be the ground of this decision.

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Then there is the well-known case of *Morgan v. Griffiths*¹ which is always cited in these cases. The respondent agreed to hire of the appellant certain grass land on the terms of a lease which was to be signed at some future time. The respondent having entered on the land, found it was overrun with rabbits, and on the lease being presented to him for signature, declined to sign it unless the appellant would promise to destroy the rabbits. The appellant refused to put a term in the lease binding him to do so, but agreed by parol that he would destroy them. The respondent thereupon signed the lease, which provided, among other things, that the tenant should not shoot, hunt or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow the landlord or friends, at any time, to hunt, shoot or sport on the land. Afterwards, the rabbits not having been destroyed by the appellant, the respondent sued him in the county court for damage done by them to the grass and crops on the land demised. The Judge on the trial admitted evidence of the parol agreement, and asked the jury to say whether it had been made, and whether the lease had been signed on the faith of it. They found for the respondent on both points. Chief Baron Kelly says:—All that is possible has been said on behalf of the defendant, but it has failed to convince me. I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease and a court of equity would not have compelled him to do so except on the terms of the defendant performing his undertaking.

1. L. R. 6. Ex. 70.

Subramanian Chettiar v. Arunachalam Chettiar. That that view of what a court of equity would do, as stated by the Chief Baron, is correct, is proved by the case of *Martyn v. Pycroft*¹. I daresay the Chief Baron had that case in his mind when he made that statement.

Now, my Lords, here it is found by the learned judge, and admitted also in the High Court, that the parties intended, and that Ramasami knew, that the plaintiff did not want this stipulation to be contained in the permanent lease and therefore this case really fulfils all the conditions which are mentioned as requisite for allowing effect to be given to the oral agreement. It was an agreement made in consideration of the lease being executed. The evidence believed by the learned judge and also by the High Court comes to this, that the permanent lease would not have been granted unless this oral agreement had been made. In the second place this lease does not contain any stipulation relating to the payment of any money during the first ten years at all. Therefore all those conditions were fulfilled.

There is one other passage I would cite, and that is a passage in the judgment of Lord Justice Bowen in *Palmer v. Johnson*,² My Lords, the passage that is often cited is at page 357 :—Suppose the parties should make a parol contract, with the intention that it should be afterwards reduced into writing, and that that which is reduced into writing shall be the only contract, then, of course one cannot go beyond it, but if they intend, as they might, that there should be something outside such contract they might agree that that should exist; notwithstanding it was not in the contract which was put into writing."

Now as regards the ground on which the High Court proceeded, I do not know that I thoroughly appreciate it. I should like to cite section 92 of the Indian Evidence Act, because I think it will be seen that the Indian Legislature intended to embody the English cases on this subject. Whether they have done so quite successfully perhaps may be doubted.

Sir Ford North :—What year is it ?

Cohen :—It is Act I of 1872, S. 92 says :—When the terms of any such contract, grant, or other disposition of property

1. 2 De. Gex. M. & G. 783.

2. 13 Q. B. D. 351.

required by law to be reduced to the form of a document has been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument for the purpose of contradicting, varying, adding to, or subtracting from its terms." That is English law too. Then there is a proviso that "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved. In considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document." That is intended to embody the English cases, and on general principles your Lordships see, as I venture to think it is quite plain, if a document is intended to embody the whole of the agreement between two parties you ought not to be allowed to add anything to it; but if it is proved that the document was not intended to embody the whole agreement, but that part of the agreement was to be contained in another document, it is difficult to see on what principle you cannot separate the two, and on what principle you should reject one document. But then it may be said that there is another consideration. Of course if that view is correct, it cannot be urged that the oral agreement was without consideration. That cannot be urged, but this point may perhaps be urged. It may be said :—True enough here is a binding oral agreement as far as consideration is concerned, but here comes in a statute which says that all the terms of the lease must be contained in a registered instrument, and this registered instrument does not contain all the terms. The answer to that seems to be, it may be therefore that the lease is void. It does not show at all that the other agreement is void now that agreements have to be in writing? I think it is section 9 of the Transfer of Property Act which defines that "A transfer of property may be made without writing in any case in which writing is not expressly required by law". As regards the leases section 107 says :—A lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument". So that it is very similar to the English law that a lease for more than three years must be by deed. In all these cases it has been held, though there is a provision that leases for a term exceeding three years must be by deed, that does not prevent the court from giving effect to an oral agreement which

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Lord Davey :—You had notice of the settlement I suppose.

Cohen :—Yes, of course, I had.

Sir Ford North :—He is the trustee.

Cohen :—I am not the Rajah. I am the plaintiff. There is no evidence that the plaintiff had notice.

Sir Ford North :—Of the assignment to himself.

Cohen :—Yes, but what I submit with great deference—because on a point of equity I may be wrong, but I thought that if the plaintiff gave notice of the assignment to him and gave that notice to the debtor, and if the trustee, the previous assignee, did not give such notice, according to the principles of equity the former assignee gained priority because he had done that which was equivalent to reducing the debt into possession. I submit according to English Law if I am right, the plaintiff would have priority. He took that necessary or prudent step of giving notice to the debtor and the trustee did not.

Sir Ford North :—That is where more than one person is before the Court each asserting he is prior to the other. That is not the case here.

Cohen :—If he is entitled in priority, surely then Ramasami could not say, I am not to pay you because I ought to pay it to the trustee. The answer would be, you will not have to pay to the trustee.

Lord Davey :—This settlement was prior in date to your document.

Cohen :—Prior in date to the assignment.

Mayne :—Long before.

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Cohen :—The plaintiff here gave notice of the assignment immediately to Ramasawmy and the trustee to whom it is said this debt was assigned gave no notice at all to Ramasami. In that case I submit to the court that under English Law the assignee who gave notice and did all he could do to reduce it into possession, according to the expression I think used by learned equity judges, would have priority over the persons who did not give notice, but then I am told that is not the case, because the question is not between the two assignees ; but I submit that if it is good law that the assignee whom I represent could have priority, then surely Ramasami who has not been called on to pay cannot, say, I will not pay you though you will have priority. What is the plaintiff to do ? The plaintiff says I have priority over everybody else. If he has priority can he enforce it ?

Lord Davey :—Quite so. He must prove he has priority and he can only do that as against the earlier assignee. If the second assignee comes forward and says I am entitled to the property and I have a superior prior title to the assignee prior to me in date, I do not see how you could prove that in the absence of the prior assignee.

Cohen :—I thought the law was that in such a case the defendant must say that he defends, to use the words of Lord Blackburn, under the title and by the authority of the assignee.

Sir Ford North :—As I understand, the case stands simply thus. The defendant says, assuming I should have had no defence whatever to the plaintiff's action for these instalments, a trust deed has since been executed by which the plaintiff's otherwise clear rights to sue me has been transferred to somebody else and that being so, the defendant says : you, the plaintiff, can no longer sue me because you have ceased to be interested. What has that to do with any question of giving notice.

Cohen :—To which I reply you have not been required to pay at all.

Sir Ford North :—What has notice to do with it ?

Cohen :—Because the first assignee has priority. It is his priority really.

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Sir Ford North :—It is not the case of a first or second assignee. The defendant says you, the plaintiff, have a clear case against me, but for this one point that you have parted with your right to somebody else.

Lord Davey :—It is not quite that. It is that the Rajah when he assigned the debt to you had not got it in him to assign.

Cohen :—What is it?

Lord Davey :—Why may not the defendant say that? You may be able to prove that although in fact the Rajah had not got it in him to assign, still by operation of law as between equitable assignees you have priority over the other man, but you must first establish that before you can sue for the debt. You have begun at the wrong end.

My Lords, on these grounds I submit that the judgment of the High Court was erroneous. The High Court admits the facts as found by the learned Judge, that is to say, the High Court admits that there was an oral agreement between the Rajah and Ramaswami before the execution of the permanent lease and contemporaneously with the negotiations for the sale that in consideration of this execution of a lease by the Rajah, the Rajah should receive certain monthly payments from Ramaswami, that the lease itself contained no terms relating to the payment of any rent or any sums of money within the ten years during which the monthly payments were to be made. All that is admitted. But I submit with deference, I come within the principle so clearly laid down by our courts, and also indicated in the Indian Evidence Act, namely, that if you find that the whole of an agreement relating to a certain matter was not intended to be contained in a certain instrument, there is no reason why you should not give effect to both instruments. The one takes effect as a lease, the other takes effect as an agreement to pay certain monthly instalments for a period of ten years.

Lord Davey.—You say it is the same as if you had given him bond.

Cohen.—Yes, exactly; now I come to the other question which is a question of greater difficulty.

Lord Davey.—What is the other question ?

Cohen.—Whether by the trust deed this debt was not conveyed or assigned to the trustee ?

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Lord Davey.—Have the courts differed upon that ?

Cohen.—Yes, the Subordinate Judge decided in our favour and the High Court reversed that decision.

Now, my Lords, the trust deed itself is to be found at page 63. The parties to that deed were simply the Rajah, and a gentleman called Rao Bahadur Vencataranga Aiyar who was a trustee named by the Rajah. It appears that the Rajah was indebted to a great number of persons; that he was very extravagant, and he thought it right to make a settlement upon his young son, and this deed of trust contains the terms on which he conveyed his property and the estate, and to this deed the parties were, as I said before the Rajah and the trustee Rao Bahadur Vencatarangaiyar, who was a pensioned Subordinate Judge. Then it recites that the settlor is seized and possessed of an estate in inheritance "All that ancestral and impartible estate" &c. &c. [Reads to the words line 22] "situate in the town of Madura." Then it states— "And whereas the settlor is desirous of making a settlement" &c. &c. [Reads to the end of clause 4]. So that you see this is done out of natural love and affection for his younger son. "And this Indenture further witnesseth" now this is the clause on which a good deal turns—"that for the consideration aforesaid" &c. &c. [Reads to the words line 34 page 64] "the said properties hereinbefore expressed to be hereby granted, conveyed and assigned respectively" And then it goes on to reserve certain interests, which the settlor has in temples and other charitable or religious institutions founded by him.

Mayne.—There is nothing in that.

Sir Ford North.—Do the parcels of the real estate conveyed by that deed include the property leased in the lease you have referred to ?

Cohen.—Yes.

Sir Ford North.—I cannot see from what you read, whether they do or not.

Cohen.—I think they did, but the permanent lease is not mentioned at all in the schedule.

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Mayne.—The recital at page 63, line 24, recites “all leases whether permanent, or for terms of years.”

Cohen.—Whereas the settlor is entitled to an estate in inheritance “all that ancestral and impartible estate &c., &c., [Reads to the words line 22] situate in the town of Madura.”

Mayne.—It is line 24 “respectively subject to such of the several debts.”

Cohen.—“Together with the buildings thereon” &c., &c., [Reads to the words line 28], “subsisting at the date of these presents” that is clause 5, and then there is the habendum, clause 6, then there is the declaration of the trust, that it is to be for the benefit of the young son; the trusts are declared.

Sir Ford North.—Nothing turns on the details.

Mayne.—It all turns on those words in clause 5 down to line 20.

Cohen.—There is to be an allowance made to certain relatives and a certain allowance for the benefit of the settlor’s heir and also an allowance made for himself. In the second schedule the allowance to be made to him is out of the estate and that is a distinction the Rajah always takes between the samasthanam, the estate, and himself personally. If your Lordships look at paragraph 23 page 69 your Lordships will see how the trustee could deal with the income, and profits of the premises :—And it is hereby further declared that by with and out of the rents &c., &c., [Reads to the words line 31] “the premises hereby assured or any part or portion thereof”, then Zemindary expenses and salary of the trustee himself, then repairs. Then :—“In the fifth place shall apply such part or parts thereof as may be required in payment and discharge of the interest on and principal of the several debts and sums of money mentioned in the said third schedule then :—“In the sixth place shall apply such part or parts thereof as may be required in payment to the several persons mentioned in the second schedule hereto during their respective lives. Your Lordships see the second schedule. The Rajah is to get out of the estate Rs. 5,500 a year and that as regards the creditors who are to be paid off at a price in the third schedule. This unfortunate Rajah was very heavily indebted to Ramasamy in the sum of 9 lacs and Rs. 20,000 more than Rs. 9,00,000.

Now, my Lords, the first point I submit is that the general scope of this trust deed, which was a voluntary assignment for the benefit of the minor son, and to which the creditors were not parties, related really to the estate of the Rajah in this Zemindary, and was not intended to include debts which would be due to him on agreements made between him, not in respect of the estate at all which he held as Rajah, and therefore would not include the monthly instalments which Ramasami had promised to pay to the Rajah. In fact it was intended and Ramasami knew that in the evidence and what was known to Ramasami is material according to the statement of the Subordinate Judge. Ramasami knew that these instalments were not included in this deed, because this deed was presented to him prepared and ready for signature, and stamped without a clause relating to the agreement concerning the monthly instalments. I will read the evidence afterwards. All this was known to Ramasami. Ramasami himself was the only person who advised the Rajah in the matter of this trust deed. This was the only advice the Rajah had. He asked Ramasami whether a reservation ought not to be inserted in this deed. Ramasami said, "Oh no, that is not at all necessary." So that my first submission is that looking at the object and scope of this deed, these debts mentioned in paragraph 5 were not intended to comprise monthly payments that might be due to the Rajah personally and not due to his estate as it were not like rents.

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Lord Davey.—Where do you get that from? These words are perfectly general:—"All and singular the outstanding debts, arrears of rent, mesne profits, claims, demands and sums of money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever." The words are large enough.

Cohen.—Your Lordship sees the words "arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever kind or description now due owing or payable." Your Lordship sees what the object of this trust deed was. It was a settlement made by this Rajah really for the benefit of his minor son. He is under no obligation to make that settlement, and he certainly did not intend, as the evidence clearly shows, to comprise in this deed the debt due to him from Ramasami. That the evidence shows beyond a doubt. He did not intend that and Ramasami knew it. It is not as if the

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trustee was coming forward and saying this money is due to me. The trustee, your Lordships remember, actually handed after the execution of the trust deed, the document of the 9th July evidencing the oral argument to the Rajah. The trustee is not coming forward himself and saying he claims this money, but Ramasami, not defending this action under the title or by the authority of the trustee at all, says: Oh, I will not pay you the assignee though I have received no notice from anybody else to pay them. I will not pay you because this debt has been assigned to the trustee.

Lord Davey.—You are not the owner of the debt in respect of which you are suing.

Cohen.—No notice has been given according to English Law. The person who gives notice would obtain priority I submit.

Sir Ford North.—There need be no notice unless there are two different persons one of whom omitted to give notice.

Lord Davey.—That is only where priority is given.

Cohen.—No notice has been given—

Lord Davey.—By the trustee of the settlement to the debtor.

Cohen.—Notice has been given by the plaintiff.

Cohen.—We have done all we could do.

Lord Davey.—You have not sued the trustee under this deed for a declaration that it belongs to you and not to him.

Cohen.—We have sued the persons with whom the contract was originally made, and then the person with whom the contract was originally made says, true enough here is a debt, but I am not going to pay you.

Lord Davey.—It is not safe to pay you.

Cohen.—I have not been asked by anybody else to pay and I cannot deny. I am assuming English law to prevail that, according to English law, you will be entitled to the money.

Lord Davey.—Yes, he can indeed.

Cohen.—I am now assuming in this part of the argument and I want your Lordships to say whether I am wrong in the assumption that if the case were between the two assignees, it would, according to English law, be decided that the assignee had priority.

Lord Davey :—Your opponents would have a lot to say on that. In the first place they would say you are not an assignee for value.

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Cohen :—No.

Lord Davey :—He did not sell the debt to you.

Cohen :—Yes, he did.

Lord Davey :—He only assigned it to you for the purpose of enabling you to sue.

Cohen :—No, my Lord, we paid down Rs. 80,000.

Lord Davey :—He might say so.

Cohen :—He could not. It is on the face of the agreement in consideration of Rs. 80,000 paid. He might say that as regards the trustee. There is no consideration as regards the trustee. It was a voluntary assignment in consideration of natural love and affection, no valuable consideration at all.

Lord Davey :—If it were the second assignee taking a voluntary assignment without consideration, he stands in no better position than the assignor himself does, and the assignor himself could not set up a title against his prior assignee.

Cohen :—No, my Lord. The plaintiff paid the Rs. 30,000 mentioned in the agreement to the Rajah.

Lord Davey :—Do you prove that the assignee under this settlement (the trustee of the settlement) gave no notice?

Cohen :—Yes, it is stated and not denied at all. I will go step by step.

Lord Davey :—Supposing that although the trustee of the settlement had not given notice, the defendant in fact knew of the settlement before he had notice of yours, then you could not acquire title.

Cohen :—That the defendant knew.

Lord Davey :—When did he acquire his knowledge?

Cohen :—The defendant Ramasami?

Lord Davey :—Yes.

Cohen :—He knew all about it.

Lord Davey :—The defendant in this action.

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Cohen :—I think your Lordship means the plaintiff—assignee.

Lord Davey :—I mean the person liable to pay—Ramasami Chettiar.

Cohen :—He had notice from the plaintiff immediately after the assignment to the plaintiff. The plaintiff gave Ramasami notice.

Lord Davey :—How do you know that Ramasami did not in fact know, though formal notice had not been given to him that there was that settlement?

Mayne :—He was advising this.

Cohen :—He did know.

Lord Davey :—Ramasami did. Then he knew of it before you gave him notice.

Cohen :—He knew of this trust deed.

Lord Davey :—That would give priority.

Mayne :—And he advised that the instalments should be kept out.

Cohen :—He advised the Rajah, I opened that.

Lord Davey :—I mean Ramasami the man you are suing.

Cohen :—I am quite following what your Lordship says.

Lord Davey :—What is there to show that he, before he had notice of your assignment, did not know of the assignment to the trustee of the trust deed.

Cohen :—I think he did know. He knew also it was intended that this debt should not be included in the trust deed.

Lord Davey :—What does that matter if it is in fact according to the true construction of it, whether it is intended or not. You can only ascertain any legal purpose by the terms of the deed itself.

Cohen :—Ought he not under such circumstances to bring in the trustee or offer to pay the trustee, or ought he not to say that he is defending this under the title and by the authority and on behalf of the trustee,—that would be intelligible—that would be a defence.

Sir Ford North :—It would be untrue to begin with; would not it? He says if I pay you, if you are not the right person to pay, I shall have to pay somebody else over again.

Cohen:—He would not if he were defending, and that is pointed out by the Judges in more than one case on behalf of the trustee.

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Lord Davey:—I know what we should have done in the old days in the Chancery division. We should have allowed the action to stand over with liberty to the plaintiff to amend by making the trustee a party.

Cohen:—That I can understand.

Sir Arthur Wilson:—That is the ordinary Indian practice too.

Cohen:—If that had been done my present argument would not apply.

Lord Davey:—You might have asked for that. Why did not you ask for it to stand over to make the trustee a party?

Cohen:—I should have thought that was the duty of the defendants.

Lord Davey:—I cannot see why. He is liable to pay.

Cohen:—The defendant may not be called on to pay anybody.

Lord Davey:—The Trustee may call on him to pay.

Cohen:—But if he feared that he ought to have made the trustee a party?

Sir Arthur Wilson:—How could the defendant have made him a party? The plaintiff could have made him a party.

Cohen:—He might apply to have him joined. He might do that according to English practice.

Sir Ford North:—He said you cannot sue.

Lord Davey:—It is for you to make out your title.

Cohen:—My first title is made out. He contracted with me.

Lord Davey:—If he had stood alone.

Cohen:—Then he says you have assigned the debt.

(Adjourned to the next day 10-30 A.M.)

Lord Davey:—Is not your strongest point that this bond debt did not pass in the settlement according to the true construction of the settlement?

Cohen:—Yes, I am coming to that.

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Lord Davey :—I think the Board is sufficiently in possession of your argument that it was a collateral agreement in consideration of the granting of a lease, with certain incidents of tenure—the creation of a tenure in a certain mode—and not part of the terms of the lease itself.

Cohen :—Yes.

Lord Davey :—I think, under those circumstances, we had better hear Mr. Mayne, and you will have a right to reply.

Cohen :—I should like to say a word or two upon that first point your Lordship mentioned—the construction. It is the 5th clause of the trust deed at page 63.

Lord Davey :—The important words are “now due and payable.”

Cohen :—Yes, now just a few words if your Lordships will allow me. The rule which applies to the construction of documents of this kind, where the question arises what is the subject-matter of the agreement, has been laid down by this Board in a judgment delivered by Lord Davey in the case of *The Bank of New Zealand v. Simpson*¹. The part of the judgment which bears upon this question begins at the bottom of page 187. “The rule is thus stated in Taylor on Evidence, 8th Edition, Vol. ii, s. 1194 :—It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words to identify the persons and things to which the instrument refers, must of necessity be received? In *Grant v. Grant*,² *Blackburn, J.*, quoted judicially the following passage from his valuable work on Contract of Sale, p. 49 :—The general rule seems to be that all facts are admissible to show the sense the words bear with reference to the surrounding which tend circumstances of and concerning which, the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected; various cases may be cited in which these principles have been applied.

In *Ogilvie v. Poljamb*,³ *Sir William Grant* says “The defendant speaks of Mr. Ogilvie’s house; and agrees to give £ 14,000 for the premises and parol evidence has always been admitted in such a case to show to what house, and to what premises, the

1. [1900] A. C. 182. 2. 34 Beav. 623. 3. 3 Mer. 53 : Sc. 17 R. R. 13.

treaty-related. In *Macdonald v. Longbottom*,¹ Lord Campbell says : Subramanian
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This was an offer made to the plaintiffs, and accepted by them of 16 per stone for your wool to be delivered in Liverpool. The only question, therefore, is what was the subject matter of the contract described as your wool? I am of opinion, that when there is a contract for the sale of a specific subject-matter, oral evidence may be received for the purpose of shewing what that subject-matter was of every fact within the knowledge of the parties before and at the time of the contract' and so on.

Lord Davey :—You must not give evidence to show what the parties intended.

Cohen :—I was going to read that passage, "Of course if the words in question have a fixed meaning, not susceptible of explanation, parol evidence is not admissible to shew that the parties meant something different from what they have said. That is not so in the present case. Their Lordships think that the total cost of the works may mean the cost to the owner of the completed Railway' and so on. Now let me look at the surrounding circumstances.

Lord Davey :—That was not a statement of any novel principle of law.

Cohen :—No, but still it collects the cases. It is an extremely useful judgment, if I may say so, I have found it so in other cases. Now let me remind your Lordships of certain circumstances in this case which are mentioned in the judgment of the Subordinate Judge and referred to by him with what appears to me to have considerable force. Your Lordships will remember that at the time of the execution of the trust deed no monthly instalments were due or, to use unambiguous words, were then payable. The words are 'now due or payable.'

Lord Davey :—Owing or payable?

Cohen :—Now your Lordships will remember Exhibit C with its endorsement. It embodies the oral agreement. It is at page 54. It had an endorsement upon it which is to be found at page 55. I still submit with great confidence that it is evidence. Just as much as the Exhibit C is evidence, so is the endorsement evidence. It was not sent alone. It was sent with that endorsement to the

1. 11 E. L. and E. L. 177; 29 L. J. Q. B. 256.

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Huzur office. The letter obtained in pursuance of the agreement entered into between me and M. R. Ry. Ramasami Chettiar Avergal, Zemindar of Devakottah, is herewith sent to the Huzur Kacheri Treasury for safe custody. This amount relates to my own allowance. It does not relate to the allowance payable from the estate, so that on the face of this instrument which was then deposited in the Huzur office it must be taken that it was known to the trustee that this document was lodged in the office not for the purpose of being dealt with as part of the estate, but for safe custody only. On that ground I submit I should have said with confidence but for the observation of one of your Lordships that that endorsement is clearly evidence and very strong evidence indeed.

Lord Davey :—10—7—95. That is the day after the date of the document.

Cohen :—Yes.

Lord Davey :—What is the date of the settlement ?

Cohen :—The 12th July.

Lord Davey :—So this is a declaration of intention by the Rajah two days before he executed the settlement.

Cohen :—Yes, sent to the Huzur office, and of which the trustee must be taken to have notice. That is one of the surrounding circumstances. I submit that that is a very pregnant fact indeed according to the principle laid down by your Lordships in that judgment. The trustee had notice that the document evidencing this chose in action was lodged in the Treasury, not for the purpose of being dealt with by the trustee as part of the estate, but for the purpose of simply being in a position of security simply for safe custody only.

Sir Ford North :—If the person who received the letter put a note upon it, and sent it to his Bankers, if anybody else got hold of it, no doubt that note might be evidence against the man who wrote it. But how can it be evidence in his favour against third parties.

Lord Davey :—Mr. Cohen says it is notice to the trustee of what his intention was.

Cohen :—I say that is a surrounding circumstance which you have to take into account when construing the words "outstanding

debts, arrears of rent, mesne profits, claims, demands and sums of money of whatever kind or description now due, owing or payable."

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Lord Davey :—Those are the important words "now due owing or payable."

Cohen :—Why is "now" put in? If instead of "or" the word had been "and" there would be no doubt about the question. Very often, if you see what is the intention of the parties, you do read for "or" "and". Your Lordships will find, on looking a little lower down that there is a contrast between these words I have first read and the words which relate to the reservation of the Devastanam. If your Lordships will look at the bottom of the page, you will find, as regards these, the expression is different "and all outstanding debts, arrears of rent, and other claims and demands payable, and to become payable, to the settlor in respect of the Devastanams Chatram and Kattalais respectively." That is in the same clause. The words are different "payable and to become payable." I wish that these words should be contrasted with the words in the preceding clause "now due or payable". I submit that taking into account all the circumstances of the case the trustee knew that he was not intended to deal with this document evidencing the right to have the monthly payments as part of the estate but simply to keep it for the Rajah. Taking into account all the circumstances I submit the learned Judge was right in holding that these words ought to be construed as meaning "then owing".

Lord Davey :—What is the meaning of "other than the Dharma Magamai" at the top of page 65 reserving to the seller "all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor in respect of the said devastanams, chattrams and kattalais."

Cohen :—I believe those are certain gifts made by pious persons towards, and in respect of, the temples and what are called rest-houses—charitable institutions.

Lord Davey :—I do not quite understand this reservation clause, because the description of the parcels describes all outstanding debts and arrears of rent now due, owing or payable; and then it reserves to the settlor all outstanding debts, and arrears of rent, payable

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Cohen :—I believe these are certain offerings made towards the temples and religious or charitable institutions. I have not been able to get any nearer explanation.

Lord Davey :—There seems to be a little discrepancy, because he first ranks all outstanding debts and arrears of rent, and then he reserves to himself.

Cohen :—Yes, I do not know why that distinction has been drawn. My only point here is that you have the words "payable" and "to become payable."

Lord Davey :—I quite follow and you have not those words in the previous part.

Cohen :—No.

Sir Ford North :—It is for the temple.

Sir Arthur Wilson :—"Devastanam" is simply a temple establishment.

Cohen :—Yes.

Mayne :—In Southern India "devastanam" always refers to the institution itself. It means the temple itself as a corporation, not as a building.

Cohen :—And "kattalais" means rest-houses I think.

Mayne :—No. I do not think so. I am not very sure, but I think it is a place for charitable endowment generally to Brahmins.

Cohen :—It is some charitable institution.

Sir Arthur Wilson :—Rest-houses are a very common form of charitable purpose.

Cohen :—Well, now my Lords, this is what the Subordinate Judge says at page 135, para. 80. The intention of the parties seems to me to be perfectly clear. The Rajah for some reason or other thought that it would not be proper to mention this sum of Rs. 500 in Exhibit II. I ought to state that the evidence given by the plaintiffs is inconsistent with the evidence given by the defend-

ants in many respects, and that the Subordinate Judge, as also the High Court, believes the evidence of the Rajah, who appeared to be a man of honor, and to be reliable, and does not believe Ramasamy's evidence.

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Mayne :—Everybody is agreed as to that.

Cohen :—He comes forward and says that he made this oral agreement out of kindness and gratitude to the Rajah and for no other consideration. He describes himself as a “money lender.” He says he was, in not mentioning it, influenced by the 1st defendant and I am inclined to believe him, &c. (Reads down to the words at page 136, line 13) as large a monthly allowance as he can possibly scrape together. Your Lordships remember at the commencement of this action about 26 monthly instalments had become due. The trustee had never called upon Ramasamy to pay any. I pray that fact in aid on account of what has been thrown out in the House of Lords; that if there is some ambiguity about the instrument you may look at the conduct of the parties after the instrument has been executed in order to see what the intention of the parties was. It is quite clear that the trustee thought that nothing was due under this instrument which he was entitled to deal with as part of the estate; or, in other words, that these words did not comprise this chose in action. If necessary, I ask your Lordships to read for “or” the word “and” which would leave no doubt about the meaning, and which would be quite consistent with what was intended by the voluntary settlor and what would be consistent with the conduct of all the parties.

My other argument which I dealt with yesterday did not seem to commend itself to your Lordships' minds. May I mention it once more quite briefly. I have no doubt if your Lordships remain of the same opinion, I shall not be able to change your Lordships' opinion, but I should like to put it once more, and it is this: suppose that the Rajah had not assigned his chose in action to the plaintiff and had brought this action in his own name against Ramasami; could Ramasami say although I promised to pay you these monthly instalments for valuable consideration I decline to pay them now to you because you assigned the chose in action to the trustee under that voluntary deed; I sub-

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mit, with deference that would be a bad defence. He could, not protect himself by putting forward the assignment to the trustee. I do not say that if he had made any payment to the trustee *protanto* that would not be a defence, but I say he cannot say "I will not pay you, although I have paid nobody else, because you have assigned your chose in action to a trustee." I submit that the ordinary rule which is applied in the case of bailments applies here. In the case of bailment there is no doubt that under the case of *Biddle v. Bond*¹ and *Rogers v. Lambert & Co.*,² the most recent case on the subject if I bail a chattel to A.B. and then on the termination of the contract of bailment demand the chattel of A. B., it is no defence for A. B. to say "that chattel no longer belongs to you because you sold it to C. D." According to the firmly established doctrine he must either interplead and say:—I have no interest in this matter at all. I owe this money undoubtedly to somebody, and I want to know to whom I owe it. Let the Court determine and I will pay the money to that person who the court says is entitled to the money. He can either interplead, or he can say, I defend this action because I am defending it under the title and by the authority of the person to whom you sold the chattel. The reason of it has been explained to be this. Supposing that the chattel had been re-conveyed by the purchaser to the original bailor, it is clear that would be no defence so that really in such cases the bailee has to shew that he is defending this action because he is liable to a third party, and he can set up *jus tertii* only when he is defending on behalf of and by the authority of that third party. Now, my Lords, if that is true let me go a step further. Suppose now the present case, namely, that the Rajah has sold, because your Lordships will remember he sold this right to have monthly instalments for the sum of Rs. 80,000 actually paid down in cash on the very same day—suppose now the Rajah sold this chose in action to the plaintiff. Is not the plaintiff entitled to say exactly what the Rajah might have said? Is not he entitled to say:—You have not paid anybody. You must pay me unless you shew that you are called upon and required, by the trustee to pay him, or in other words, you can only defend this action under the title, and by the authority, and on behalf of the trustee. I am not going to trouble your Lordships any longer about that point, but that is the

1. 34 L. J. Q. B. 187.

2. [1891] 1 Q. B. 318.

argument I intended to submit yesterday. I have not been able to find cases bearing upon the subject. I have not been able to find any case in which this particular question has arisen between the assignee of a chose-in-action and the debtor.

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Sir Ford North :—Supposing the assignor brought an action against the person who is bound to pay and that person, taking the view which you advocate did pay, and subsequently the assignee brought an action against him for the money what defence would there be?

Cohen :—I am supposing a case where no payment has been made.

Sir Ford North :—I am putting it supposing the person who is sued, taking the view you put forward to be the right one, did pay the assignor after he had notice of the assignment, and subsequently the assignee brought an action against him what answer would he have?

Cohen :—The first assignee!

Sir Ford North :—We are talking of the assignor who subsequently assigns the debt by a trust deed, which everybody knows of. The assignor then, though he has assigned the debt, brings an action against the person who is bound to pay, and that person, adopting the view you put forward does pay.

Cohen :—I should say he ought not to pay.

Sir Ford North :—You say he should.

Cohen :—No, pardon me. I say he should either interplead, if there are two claims, or, if he does not interplead, he should defend on behalf of the person.

Sir Ford North :—Assume he has not got that leave from the assignee to act for him, and represent him?

Cohen :—Well then, I should say he would be liable.

Sir Ford North :—Then he would have to pay twice over.

Cohen :—Well, that is his own fault. The same doctrine applies to the case of bailment. I have not been able to find a single case in which the second assignee who is given actual notice has brought an action against the original debtor. I pass now from that. There

Subramanian Chettiar v. Arunachalam Chettiar. is one other point with which I wish to trouble your Lordships briefly, and it is this. Your Lordships will remember that on the 30th of November the Dewan or Trustee—

Mayne :—That is a mistake ; it is not a Dewan or Trustee.

Cohen :—He is called the Dewan in the trust deed itself.

Mayne :—Whatever he is it was not the trustee who returned that. It is a totally different person.

Cohen :—He allowed it to be returned. It was returned to the Rajah ; and it was only by reason of that document having been returned that the Rajah was enabled to assign it to the plaintiff. The assignment is to be found at page 55, Exhibit D. whereas a Varthamana Kaduthasi (letter) was executed to me on 9th July of the current year &c., &c. [“Reads down to the words] Rs. 60,000 being the aggregate sum for ten years ” so that it was by means of this instrument, which had got back into the hands of the Rajah, that the plaintiff was induced to pay the Rs. 30,000, in other words, he was clothed with the power of disposing of the chose in action, and I submit that the principle applies—at least it is now being discussed in the House of Lords, and it was laid down in the case of *Farquharson Brothers and Co. v. King and Co*¹, and it was, I believe, argued yesterday in the House of Lords. In that case, it was laid down by the majority of the judges in the Court of Appeal—“That where one of two innocent persons must suffer loss through the acts of a third person, he who has enabled the third person to occasion the loss must sustain it ; that the plaintiffs by their conduct had enabled the clerk to hold himself out to the defendants as entitled to dispose of the timber and were therefore estopped from disputing his title to do so. Here I say the trustee by enabling the Rajah to dispose of the chose in action would be estopped from disputing the title of the assignee. To use the words of Lord Blackburn in another case, he clothed the Rajah with the power of disposing of the chose in action, and if the trustee is estopped then, I suppose in as much as after all Ramasami has no right to it independently, he would also be estopped ; and that is the last ground on which I submit that the judgment of the High Court was erroneous.

1. [1901] 2 K. B. 697.

2. See [1902] A. C. 335.

Sir Arthur Wilson :—Is there any evidence as to how the document got back ?

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Cohen :—There is conflicting evidence as to that.

Mayne :—I do not think there is any conflict at all.

Cohen :—Perhaps you will shew that. I think there is conflicting evidence, and the Subordinate Judge believed the statement that it was with the sanction of the trustee that this document was returned.

Sir Arthur Wilson :—Can you refer us to the passage in the Subordinate Judge's judgment ?

Cohen :—My learned friend Mr. Branson points out that on looking at page 61, Exhibit K, you find that it is addressed to the Dewan Trustee.

I have the honour to request that you will kindly issue orders "&c. &c. [Reads Exhibit K] at page 85, there is this :—My duties are the sub-division of all departments under the Dewan. I collect under the orders of the Dewan the debts due to the estate, if any.

The Dewan is the trustee.

Sir Arthur Wilson :—Are we to take it that the Dewan and the Trustee is the same person ?

Cohen :—I think so, I will go on reading it. "To the best of my knowledge there is no debt due by him on pro-note or bond" &c. &c. [Reads down to the words at line 30] "when he gave me the above direction." Will your Lordships' look at page 65, the Trust deed. Your Lordships will find in paragraph 7, "and it is hereby declared that the said Rao Bahadur Vencatarengaiyar &c., &c., [Reads down to the words at line 29]" may be styled and designated Dewan, or Dewan Trustee, and the letter is addressed to him. I think it is all along assumed that the Dewan was the trustee.

Mayne :—Yes, that seems to be so.

Cohen :—I say there is a conflict of evidence, and the learned Subordinate Judge and the High Court believes our witnesses.

I submit, therefore, in the first place, that there were two alternative defences raised, if your Lordships will allow me to sum

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up my argument. In this case there are two alternative defences raised. One defence is that there was no oral agreement before the execution of the lease and that the agreement was come to after the lease, without any valuable consideration at all. That is disproved by the concurrent findings of the two courts. As I pointed out yesterday, and there is no doubt that those findings are correct. Then it is said that that must be in writing, and in writing registered. Well, now inasmuch as this document or instrument, conveys no charge on real or immoveable estate, I submit there is no enactment which requires the agreement to be in writing; and the only remaining question is, is it excluded by the fact that there was a lease now. I should like to give two illustrations before I leave this part of the subject. I feel very strongly on this point. Suppose for a moment that this agreement was come to before the lease was executed in consideration of the Rajah executing a lease which was to take effect in about ten or twelve years, Ramasami promises to buy of the Rajah his, say, black horse for £ 100. Can any one doubt after the cases I have cited that an action would lie upon that agreement. Let me go a step further. Suppose that in consideration of the Rajah executing the lease which was to take effect in ten or twelve years Ramasami promised to pay a premium, can there be any doubt that an action would lie? The fact is the true principle laid down now by the courts is—you have to ascertain whether a certain document was intended to embody all the terms which have been agreed to by the parties. If the jury find as a fact that that was the intention, then you can only look to the instrument and to nothing else.

On the other hand, if there is an oral agreement, or a written agreement which on the face of it shows that the lease was not intended to embody all the terms of the agreement, then, at any rate, if that oral agreement contains nothing inconsistent with the lease, effect must be given to it.

- I mentioned a case yesterday in 2 De Gex Macnaghten and Gordon, but I did not read it. It may be of use just to see how a court of equity deals with this question which has been dealt with so frequently now by courts of common law. That was the case of *Martin v. Pycroft*. It is at page 785. "Where persons sign a written agreement and there has been no fraud or mistake, the

written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to which has not been inserted in the document. Subject to this, that the defendant in equity may call upon the court to be neutral unless the plaintiff will consent to the omitted term. Where, therefore, the defendants agreed in writing to grant a plaintiff a lease at a specified rent, and for a specified term subject to the same covenants, clauses and agreements, as were contained in an expiring lease under which he then held the property and the plaintiff filed a claim for specific performance stating the above agreement and that it was further agreed that he should pay a premium of £ 200 which by his claim he offered to do. Held reversing the Vice Chancellor's decision that this additional term did not render the statute of frauds a valid defence to the claim." That is to say the defendants could not say this lease is invalid because it does not contain all the terms other defences having been set up and so on.

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Lord Davey :—Is it more than this? He says I will give you a bond if you will create in my favour a tenure of land with certain defined incidents.

Cohen :—Perhaps I ought not to have re-argued that point.

Lord Davey :—This is in no sense a rent because it has none of the incidents of rent. It could not be recovered as rent. It is a mere personal obligation.

Cohen :—If you look at the lease, you will find it is said that the rent shall be recovered under the Act of 1865.

Lord Davey :—Rent in India is recoverable according to certain statutory and well known laws, and it is not a rent, nor recoverable as a rent. It is recoverable only by action as money due.

Cohen :—On these grounds I submit the judgment of the High Court was erroneous, and therefore the Subordinate Judge was right.

Branson :—I have nothing to add.

Mayne :—May it please your Lordships. There are two general questions, the latter sub-divided into several questions to be considered in this case; first, the arguments on the first point raised by the High Court, namely, that this document could not be

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I submit that the first question is this whether the document C, we will call it the agreement, is a collateral contract extrinsic to the terms and consideration of the lease or whether it is a splitting up of those terms and conditions and putting part of them so split up into a document separate from the lease so that it shall not form part of the registered document which is presented to the public as being the lease but shall be kept secret from it to serve the purposes of the settlor.

Now, my Lords, upon this point the only evidence that is Ramasami's evidence is dismissed from the case. Practically therefore this question turns first upon the plaint in which the plaintiff puts forward his own view of the transaction, and secondly upon the evidence of the Rajah which the court believes and which I ask your Lordships to believe.

Now the plaint puts forward this view. It first states the lease of the 4th July 1895 in the first paragraph, and secondly the counterpart of the 5th day of July 1895. That is at page 4 of the plaint. Now I read paragraph 3 "some time before the execution of the said two instruments" &c., &c., (Reads down to the words line 29) to "pay the same with interest at 1 per cent. per mensem." Then the Zemindar's evidence upon this your Lordships will find at page 79.

Lord Davey :—Is it a question of evidence?

Mayne :—Well, my Lord. I will read the evidence to your Lordships and then put before your Lordships the view I shall ask the court to take. He says "Kannangudi Taluk is a portion of my Zemindary" &c., &c., (Reads down to the words line 8, page 80,) "is written by me and is wholly in my handwriting." "Then further on at line 27 he is asked" (R). Was the monthly payment of 500 rupees for ten years arranged and settled to be one of the conditions of the Kannangudi lease to be granted by you? (A). Yes."

Lord Davey :—He is not a lawyer. He had stated what the fact was and then his astute lawyer put it to him "Was it arranged and settled to be one of the conditions of the lease?" He is not a

lawyer, and he does not see the trap that has been laid for him, and he falls into it. There is nothing in that surely.

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Mayne :—He says : “It was to be one of the conditions of the lease but not to be recited in the document. This condition of the payment of Rs. 500 was talked of for some days in the course of the negotiations and then eventually settled a day or two before the date of A.” Now I submit the arrangement between them was this :—The lease which he was granting was a lease of land which was already under lease up to the Fasli year 1319. That would be up to 1909 of the present century. Therefore the Rajah would get no present benefit from the lease. His object was to have a continuous income starting from the time at which the lease was granted and up to the time at which the lease began. Therefore he stipulated that he should have a payment of Rs. 500 a month for the 10 years up to the time the lease would begin. Now of course that was not a gratuity. In addition to the rent it was in fact an anticipation to a certain extent of the rent which was to be paid for the lease, an anticipated payment going on for so many years.

Lord Davey :—It could not be recovered as rent ?

Mayne :—No.

Lord Davey :—It was a mere personal bond.

Mayne :—Quite so. But your Lordship will see that that would operate in diminution of the rent which was ultimately to be paid.

Lord Davey :—It had nothing to do with the incidence of the tenure. It did not affect the incidents of the tenure in any way. He created a tenure with a certain rent and on certain conditions and in consideration of his doing so in favour of the defendant, the defendant gave him this bond for payment of a sum of so much a year. It had nothing to do with tenure ; the tenure is complete in itself.

Mayne :—It had a very considerable effect upon the rent that was granted for the lease.

Sir Arthur Wilson :—How does that matter ?

Mayne :—It only matters in this way. The lease must be registered. The object of the registration is to shew the whole of

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Lord Davey :—I should have thought the object of the registration was to show what were the incidents of the tenure.

Mayne :—Well that is the way I put it, that the consideration for the lease is one of the incidents of the lease.

Lord Davey :—Not of the tenure.

Mayne :—Not of the tenure. That is the point I put to your Lordship and that is the point on which the High Court decided. The High Court considered that the consideration for the lease was part of the terms of the lease and that inasmuch as the Legislature says a lease must be registered that they meant all the terms, not only those terms which are in the nature of rent but also those terms which show as between the parties the consideration upon which the lease was granted, that is that everything that is connected with the making of the lease, the consideration upon which the lease is made form parts of those terms which must be embodied in a registered document and that in fact the result is to leave out of the registered document part of the terms which constitute the negotiations between the parties which resulted in the lease.

Sir Arthur Wilson :—You argue that from the Transfer of Property Act?

Mayne :—Not only from the Transfer of Property Act but from the Registration Act.

Sir Arthur Wilson :—The Registration Act requires that whatever document is signed between the parties shall be registered in order to have a secure record of what the terms of that document are. It is only to secure the certainty of the terms.

Mayne :—It provides that every lease for more than one year shall be registered. Then the Transfer Act provides that the lease must be in writing and registered. It does not go beyond the terms of the Registration Act S. 107 (the learned Counsel read the section). I submit the lease must show not only the rent but all other considerations money considerations which tend to affect the

terms of the rent. For instance I submit that if it creates a permanent lease (and this was a permanent lease) in consideration of a rent of Rs. 500 and the payment of a lac of rupees, the lac of Rs. must be mentioned so as to explain how the rent was only Rs. 500 instead of Rs. 5,000. The rent here of course was diminished by the fact that this payment in anticipation during all these ten years previously was being made. That was in the nature of either a payment of rent in advance before possession was given or something in the nature of a premium, the result of which is to diminish the rent which is ultimately fixed and I submit that the object of the lease is to have everything not only which states but which explains the amount of the rent that is fixed or put upon the registered document for the purpose of security as between the two parties and for the benefit of the public who may have afterwards to deal with it and who have the right of inspecting it and acting upon it.

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Sir Arthur Wilson :—Is there a right in the general public to inspect the register?

Mayne :—I think so.

Sir Arthur Wilson :—There is a right to search for any document in which they themselves are concerned, but is there a right for a member of the public to go and search a document which only concerns you and me?

Mayne :—Suppose a person borrows money, the first thing you do is to go and see what he has done with his property. You have a right to search the register and to inspect it and to get a copy by payment. It would be most material to any one who is entering into monetary dealings with a Zemindar to see what he had done with his property. Suppose the lessee was selling the property; it might be very material to ascertain what was the real value of the property, and if the rent payable on that was not the real value of the property but was a rent which had been diminished in consequence of previous payments which the lease did not disclose, that might tend very materially to defraud the person who was entering upon a subsequent transaction. That is the view I submit to your Lordships as explaining why every document should be registered and every part of the consideration—it is in fact part

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of the rent because it is a circumstance which determines the rent and makes it less than the rent would otherwise have been.

Now, my Lords, I go to the next question arising out of the assignment under the trust deed. This, I think, seems to branch into three questions. First whether the payments under the separate agreement was or was not assigned to the trustee under clause 5 of the trust deed. Secondly, if assigned, whether the fact that it was so assigned to the trustee is an answer to a suit by the present plaintiff to whom a subsequent assignment of the same thing was made; whether the fact that it was so previously assigned is an answer to his suit. Thirdly, whether if it otherwise would have been an answer, the trustee by his own act in enabling the Zemindar to get possession of this document has enabled him to do an act, that is to get money from the second assignee, which he would not have been able to do unless he had had the document in his own possession to hand over to him. Those seem to be the three points into which my learned friend's argument resolves itself.

Now, first of all we look to the trust deed itself at page 63. Clause 2 deals with landed property coming under three several heads, and it expressly refers to the fact that many of these properties are subject to leases, permanent or for terms of years and therefore that the trustee will only get leases. It begins at page 63 but the really important part is clause 5. In addition to that he assigns "all and singular the outstanding debts, arrears of rent, mesne profits, claims, demands and sums of money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents and also all moneys, hundies, cheques, currency notes." Now this is very important—"or other securities for money now in the Huzur Treasury Office at Ramnad".

Lord Davey :—You must read the whole of that sentence.

Mayne :—I will go on : "and also all other documents, records, correspondence and other papers now in the Record Office, Huzur and Taluq Offices respectively in the said Zemindari or which have been produced by or on behalf of the settlor or his agents, officers, clerks or servants in any public office or court in connection with

any suit, proceeding or matter and which relate in anywise to the said properties hereinbefore expressed to be hereby granted, conveyed and assigned respectively or any of them"—Then comes this: "and all the estate, right, title and interest, claim and demand of him the settlor into and upon the same premises respectively hereinbefore expressed to be hereby granted, conveyed and assigned respectively." Then comes the reservation: "Except and always reserving unto the settlor out of the said hereditaments and premises and the grant and assignment hereby made all those several Devasthanams, Chatrams and Kattalais with their respective appurtenances situate in the said Zemindari and now under the superintendence and control of the settlor and the lands and endowments of whatsoever description attached thereto respectively and situate in the said Zemindari and all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor in respect of the said Devasthanams, Chatrams and Kattalais respectively," and so on. The reservation then your Lordships see is exclusively as to religious and charitable endowments of which the Rajah was the hereditary superintendent, owner and representative and so on—matters which were of no personal value to him, because the whole of their profits of course went to the particular purposes for which the institutions were endowed but which gave him what is extraordinarily highly valued by all the Rajahs and great men in the country, gave him the high position in the country of representing, superintending and being as it were the source of all the religious institutions and all the benevolent endowment in the country. Apparently the result of the trust deed is to divide all his property into two classes: all in which he is beneficially interested is in the first class; all in which he is interested simply as the representative of religious and charitable endowments is in the second class. The whole of the first class, with the most sweeping words that can possibly be imagined seems to be assigned over to the trustee. He only reserved to himself the particular payments which, under subsequent clauses, the trustee is entitled to make to himself personally. I think it is admitted that the monthly payment to himself was Rs. 5,500.

Cohen:—Out of the estate.

Mayne:—I suppose that was to be paid out of the estate, but everything else whether those payments came out of the estate

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or not—"all and singular"—not only the outstanding debts, not only the arrears of rent and mesne profits but all "claims, demands and sums of money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever"—and the right to sue for them and also "all securities for such debts, arrears of rent, mesne profits, claims, demands and sums of money as aforesaid or any of them and other documents" were assigned over to him. Now first of all, does not this payment of Rs. 6,000 a year come under one or other of these heads? It comes under the head of "all sums of money of whatsoever kind now due owing or payable." Was not this a sum payable to him at that time that is payable to him month after month under a security, which security was at that time, at the time of settlement, in the Huzur Treasury and sent by him there on the 9th of July.

Branson:—That is not right in fact. It was not in the Treasury at the time of the execution.

Mayne:—Yes, it was sent there on the 9th July. If I am mistaken, I will say so. It is at pages 60 and 61.

Branson:—It was received on the 15th in the Treasury.

Cohen:—I do not think it matters much. If your Lordships look at page 61, you will find it was received on the 15th July.

Mayne:—"Entered in the record book and kept in the Treasury 15—7—95". It was sent to the Treasury on the 12th. That is at page 60. There is a letter to the Rajah "on the 9th instant by A. L. A. R. Ramasami Chettiar Avergal of Devakottah agreeing to pay at the rate of Rupees 500 per month for a period of ten years as consideration for the permanent lease granted to him in respect of Hanumanthangudi Taluk is herewith sent. It should be kept in the Treasury for safe custody."

Cohen:—Look at page 85, line 17, where you find it clearly proved that the head shroff received it on the 15th July. He has so initialled it.

Mayne:—It is sent to be kept in the Treasury on the 12th. That is at page 60.

Cohen:—And received on the 15th and so initialled. It is line 14, page 85.

Mayne :—I am coming to that immediately. It was sent on the 12th. Your Lordships will see the document I at page 60. It should be kept in the Treasury for safe custody. "For all practical purposes it has passed out of the personal possession of the Rajah on the 12th to be kept in the Treasury for safe custody. Then it seems to have been entered in the Record Book as kept on the 15th of the same month. There was, I suppose, a certain amount of red tape to be passed through. It remained there until it is got back on the 30th of November.

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Sir Arthur Wilson : Then it was not in the Treasury at the date of the trust deed?

Mayne :—The trust deed was on the 12th.

Lord Davey :—When it is deposited it is deposited with an endorsement and sent in with a letter saying it is to be deposited merely for safe custody.

Mayne :—Your Lordships will see it is not only he assigns all monies now due and owing or payable, but also in addition to that all securities for such debts now in the Record office—so that if it was in the record office on the 12th or in the taluk office—this is a Takid to Narayanan Chettiar, Head Shroff of Huzur Treasury, and received by the Ramnad office—it must have left the Rajah a little before that date; but it had left the Rajah at all events on the 12th for the purpose of being transferred to the Treasury; for safe custody or otherwise, I submit, it makes no difference. Therefore, I submit that that does come distinctly within the terms of the operation of clause 5 and does not come within the reservation clause.

Now look at what the Rajah says about this document, and about the registration clause. I go on from the part I read on the first question at page 80, line 39. "I say it is not a fact that Exhibit C was given to me at my special request subsequent to the date of it as a favour by the defendant" &c. &c. (Reads to the words page 81, line 19. "I have never up to date talked to, in the shape of receiving advice; either Mr. Bhashyam Aiyangar or Mr. Subramaniya Aiyar."

Sir Arthur Wilson :—Is Ramasami a lawyer?

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Mayne:—No my Lord, he is a money-lender. Then he says:—
“I would have inserted this monthly payment of Rs. 500 in the trust deed, if the deed had not been printed or stamped (to my recollection) and if Ramasami Chettiar had not advised me that it was unnecessary. I was not aware that I could have added this in writing in the trust deed before actually signing it although it was printed and stamped. I now know that before actually signing a document I might make any alterations therein. I cannot say how long after the date of Exhibit I I came to know this, but it was when a document was brought to me, in which I was asked to add some portions left out.” So that the view the Rajah perfectly honestly states is that this document no doubt was a document *prima facie* he had designed and asked Ramasami and said this ought to be inserted in the reservation clause, but he said:—“Oh No, that is not necessary. That will be made all right by this document, and trusting to his explanation I did not reserve it; and practically therefore the result is that it is not reserved.” Practically therefore as I say the result is it is assigned by the first part of clause 5 and is not reserved by the second part of clause 5. Therefore, I submit that the assignment of that to the assignee is complete.

Now, my Lords, the second question is whether the defendant is entitled to set up this as against the subsequent assignee. His position, as I submit, is this, that under the trust deed this was assigned to the trustee. Ramasami Chettiar being cognizant of the dealing with the whole of this transaction and especially having his attention directed to this document knew that in point of fact the document did assign this to the trustee. Therefore, he had notice of the assignment to the trustee. Therefore the sums payable were assigned to the trustee, and the person who has to pay the sums had notice that they were so assigned. The second agreement is made in December. After it has been made there is a notice to the payer—the promisor of this note, but the assignment to the present plaintiff is subsequent to the assignment of the trust deed, and the notice to the defendant of that assignment again subsequent to the notice by the trustee. Therefore, I submit that it is perfectly clear that Ramasamy Chettiar has no answer whatever to a suit by the trustee assuming that the first part of my argument is correct, namely, that the money was in point of fact assigned. My learned friend says this is a case like that of a bailee.

Lord Davey :—A bailee cannot dispute his bailor's title.

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Mayne :—No, my Lord, he cannot dispute his bailor's title. That is the simple point.

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Lord Davey :—He has nothing to do with the assignor and assignee.

Mayne :—Nothing whatever. It is just as if a man sells an estate. He cannot afterwards bring an action against his tenant. The purchaser has a right to sell and the tenants would have no defence against the person who does sue. Upon that second part of the argument, therefore, I submit that my learned friend is wrong.

Lord Davey :—I should like to ask you one question on the former part of your argument. There is nothing in the evidence whatever. Is there? I have not noticed anything, to dispute the genuineness of that letter Exhibit J, in page 60, the letter in which the Peishkar sends the agreement to the Treasury on the 12th July 1895.

Mayne :—No, my Lord.

Lord Davey :—Or the endorsement of it which is said to be initialled by the Head Shroff or clerk.

Mayne :—No, my Lord.

Lord Davey :—The Exhibits J1, J2 and J3.

Mayne :—That is perfectly genuine, and also I cannot assert that there is anything that is not genuine in the document. I now pass to the third point of my argument, namely, that the trustee has been instrumental in enabling the Rajah to do that which is either a fraud upon the trustee or a fraud upon the present plaintiff, the subsequent assignee.

Lord Davey :—I do not think we need trouble you about that Mr. Mayne.

Mayne :—Very good, my Lord. Then, if so, I have closed all I have to say.

Lord Davey :—I do not think we need trouble you, Mr. Cohen. Their Lordships will consider their judgment.

Their Lordship's Judgment was delivered by:

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Sir Arthur Wilson :—The material facts of this case were not in dispute before their Lordships and they can be briefly stated.

The Rajah of Ramnad was the proprietor of the Zemindari of the same name. On the 4th July 1895 he executed a reversionary lease of portions of his Zemindari in favour of Ramasamy Chettiar. The lease recited that there were subsisting leases affecting the properties demised, some of which would not expire till the Fusli year 1318, corresponding to A. D. 1911. The new lease was accordingly made to commence with the Fusli year 1319; it was expressed to be perpetual; the annual rent was fixed; its recovery as well as that of road-cass and other charges was provided for; and the rights and obligations of both parties defined. A counterpart of the lease was executed; and both lease and counterpart duly registered.

During the negotiations for the lease it was agreed between the Rajah and Ramasamy that in consideration of his obtaining the lease, Ramasamy should pay to the Rajah a sum of Rs. 500 a month for a period of ten years from July 1895.

On the 9th July 1895 the arrangement with regard to the payment of Rs. 500 a month was put in writing in the form of a letter addressed by Ramasamy to the Rajah in the following terms :—

“Varthamana Kaduthasi.

“Sivamayam (God everywhere).

“To M. R. Ry. Bhaskara Sethupathi Maharajah Avergal.

“Varthamana Kaduthasi (letter) written by A. L. A. R.
“Ramasami Chetti of Devakottah.

“You have let to me on permanent lease on the 4th day of the
“current month of July, the villages of Kannangudi Vagaira
“Division for a sum which represents the average income of ten
“faslis together with one-eighth thereof. As agreed to by me to
“pay as consideration therefor, I shall pay you at the rate of five
“hundred rupees per mensem for ten years, that is, for one hundred
“and twenty months, beginning from July current. In default
“of payment in any one month, I shall pay the sum in respect of
“which default was made with interest at 1 per cent. per mensem
“from the date of default.

“(Signed on one anna stamp) Ramasami Chetti.

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9—7—95”.

On the 12th July the letter was sent to the Huzur Treasury with a note that “it should be kept in the treasury for safe custody”; and on the 15th its receipt was registered.

On the 12th July 1895 the Rajah executed a trust deed in which he recited that he was possessed of his Zemindari subject to subsisting debts, charges, incumbrances and leases, and that he was desirous of making a settlement for the benefit of his heir apparent and elder minor son. The deed assigned to Venkatarangaiyar as trustee (in paragraph 4) the Zemindari with its incidents. In paragraph 5 he further assigned “all and singular the outstanding “debts, arrears of rent, mesne profits, claims, demands and sums of “money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever and all rights to “prosecute any suit or other proceedings existing in favour of the “settlor at the date of these presents and also all monies, hundies, “cheques, currency notes or other securities for money now in the “Huzur Treasury Office at Ramnad and in the several Taluq “Treasuries in the said Zemindari and also all securities for such “debts, arrears of rent, mesne profits, claims, demands and sums of “money as aforesaid or any of them and other documents in respect “of the same respectively and also all other documents, records, “correspondence and other papers now in the Record Office, Huzur “and Taluq Offices respectively in the said Zemindari or which “have been produced by or on behalf of the settlor or his agents, “officers, clerks or servants in any public office or court in connection with any suit, proceeding or matter and which relate in any “wise to the said properties hereinbefore expressed to be hereby “granted, conveyed and assigned respectively or any of them and “also all firearms and other weapons, belts and badges now held or “used by any peons or other servants of the settlor and also all “furniture, fixtures and other articles in the Huzur and Taluq “Offices in the said Zemindari and all the estate, right, title and “interest, claim and demand of him the settlor in to and upon the “same premises respectively hereinbefore expressed to be hereby “granted, conveyed and assigned respectively except and always

Subramanian Chettiar v. Aranachalam Chettiar. “reserving unto the settlor out of the said hereditaments and premises and the grant and assignment hereby made all those several Devastanams, Chatrams and Kattalais with their respective appurtenances situate in the said Zemindari and now under the superintendence and control of the settlor and the lands and endowments of whatsoever description attached thereto respectively and situate in the said Zemindari and all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor in respect of the said Devastanams, Chatrams and Kattalais respectively (other than the Dhurms Magamai and Jari Magamai payable in respect of Devastanams and charities) and reserving also unto the settlor all rights to prosecute any suit or other proceedings now existing in respect of the same and to or in which he is a party or is otherwise interested, and also all moveable property in or about the buildings and premises erected and being on the said lands and premises firstly, secondly, thirdly and fourthly described in the said first schedule hereto, and reserving also unto the settlor during his life the right at all times to reside with the members of his family in the several palaces and buildings comprised in the said lands and the Zemindari and in the said premises described in the said first schedule hereto, but without prejudice nevertheless to the right of the said Raja Rajeswara Dorai otherwise called Muthu Ramalinga Dorai or his heir to reside with the members of his family in all or any of the said palaces and buildings.”

The trusts were declared, which included the payment of a monthly allowance to the Rajah himself.

No payments having been made by Ramasamy in respect of his agreement to pay Rs. 500 a month, the Rajah on the 9th December 1895 assigned that agreement for value to Ramanadhan Chettiar; and notice of this assignment was at once given to Ramasamy.

On the 21st September 1897 the present suit was filed in the Court of the Subordinate Judge of Madura (East) by Ramanadhan Chettiar, since deceased, and his son Subramanian Chettiar, the present appellant, against Ramasamy, since deceased, and others who now represent him and who are the respondents. The claim

was to recover twenty-six monthly instalments at the rate of Rs. 500 a month interest. Subramanian Chettiar v. Arunachalam Chettiar.

It is only necessary to refer to two grounds of defence. It was contended first that the original agreement for the payment of Rs. 500 a month was void in law as not being in writing registered, and that the plaintiffs were not entitled in law to prove the existence of such oral agreement. It was contended secondly that whatever right the Rajah might have had under the agreement to pay him Rs. 500 a month, had been transferred by him under the trust deed of the 12th July 1895, and that therefore neither Ramadhan nor his representatives had any right to sue upon the agreement.

The Subordinate Judge decided in the plaintiff's favour upon both points and made a decree in accordance with the claim of the plaintiff. An appeal was filed in the High Court of Madras, and that court reversed the decision of the lower Court and dismissed the suit, holding that both the grounds of defence were good in law.

With respect to the first of these questions, that going to the legal validity of the agreement for the payment of Rs. 500 a month, it is necessary to refer to certain of the terms of three Acts of the Indian Legislature.

Section 92 of the Evidence Act (I of 1872) enacts that :—" When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

The Registration Act (III of 1877), S. 17, includes amongst the documents requiring registration "leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent."

The Transfer of Property Act (IV of 1882) S. 105 defines a lease thus :—

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied,

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The agreement for the payment of Rs. 500 a month for 10 years from July 1895 is in no way inconsistent with the lease of the 4th of that month. Its provisions form no part of the terms of the holding under the lease; their effect will be exhausted some years before the lease takes effect. The payment bargained for is no charge on the property; it is not rent nor recoverable as rent, but a mere personal obligation collateral to the lease. Their Lordships are of opinion that the agreement is not affected by S. 92 of the Evidence Act; and that there is nothing in the Registration Act, or in the Transfer of Property Act which required that it should be registered as part of the lease.

The second question is whether the respondents are right, in their contention, that the benefit of Ramasamy's agreement to pay Rs. 500 a month to the Rajah passed to the trustee under the trust deed of the 12th July, and that therefore the subsequent assignment of Ramanadhan was ineffectual, and that the plaintiffs in this suit had no right to sue. The answer to this question depends upon the construction to be placed upon the trust deed.

The Rs. 500 a month not being rent, the right to it could not pass under the grant of the Zemindari with its incidents contained in paragraph 4. But it was contended that the right was conveyed by the more general words of paragraph 5, by which the settlor assigned "the outstanding debts, arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever kind or description now due, owing or payable to the settlor on any account whatsoever, and all rights to prosecute any suit or other proceedings existing in favour of the settlor at the date of these presents." The use in an Indian document of the words "now due, owing or payable" in defining the claims transferred, coupled with the words which follow restricting the transfer of rights of suit in

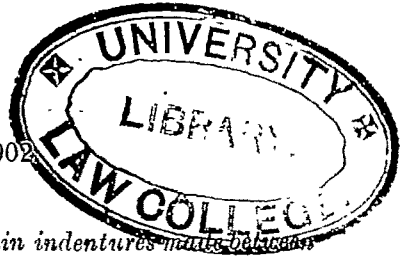
respect of such claims to those existing at the date of the deed, appear to their Lordships to show that rights of the nature of that now under consideration, accruing after the date of the deed, were not intended to pass, a view which is somewhat strengthened by the employment of the phrase "demands payable and to become payable" in the exception and reservation which follows. And it appears to their Lordships that under the agreement between the Rajah and Ramasamy all the instalments now sued for accrued due after the date of the trust deed.

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It was further suggested that the words in the same paragraph, "all monies, hundies, cheques, currency notes or other securities for "money now in the Huzur Treasary office at Ramnad," included Ramasamy's letter of the 9th July, and that therefore the Rajah's right to the Rs. 500 a month passed under the trust deed. As to this suggestion it is sufficient to say that there is no evidence that the letter in question was in the Treasury when the deed was executed. All that appears is that on the 12th July, the day on which the trust deed was executed, but whether before or after the execution does not appear, the letter was sent to the Treasury for safe custody, and that its receipt was recorded on the 15th.

Their Lordships will humbly advise His Majesty that the decree of the High Court be reversed with costs and that of the Subordinate Judge restored. The respondents will pay the costs of this appeal.

ACT No. I OF 1902



An Act to confirm and validate certain indentures made between the Agricultural and Horticultural Society of India and the Calcutta Public Library, respectively, and the Secretary of State for India in Council.

Whereas an indenture, a copy whereof is set forth in the first schedule, was expressed to be made, on the tenth day of April, 1901, between the Agricultural and Horticultural Society of India, of the first part, the president and members for the time being of the said Agricultural and Horticultural Society, of the second part, and the Secretary of State for India in Council, of the third part ;

And whereas an indenture, a copy whereof is set forth in the second schedule, was expressed to be made, on the twentieth day of December, 1901, between the Calcutta Public Library, of the first part, the vice-president for the time being of the said Calcutta Public Library, of the second part, the members for the time being of the council of the said Calcutta Public Library, of the third part, and the said Secretary of State in Council, of the fourth part ;

And whereas the said indentures respectively purport to grant and transfer, for consideration, unto the said Secretary of State in Council absolutely the land described therein, or in the schedules thereto, respectively, and the building, with out-buildings, known as the Metcalfe Hall situate in the town of Calcutta in the territories administered by the Lieutenant-Governor of Bengal ;

And whereas the said Agricultural and Horticultural Society and Calcutta Public Library have been registered as societies under the Societies Registration Act, 1860 ;

And whereas it is expedient that any doubt as to the legal effect of the said indentures should be removed, and that the said indentures should be confirmed and declared to be valid and binding in law for all the intents and purposes expressed therein respectively, and especially for the purpose of vesting the said property in His Majesty absolutely so as to be made available for the purposes of an Imperial Library to be established in the said town of Calcutta,

or for any other use or purpose to or for which the same may be, or may be intended to be, hereafter applied;

It is hereby enacted as follows:—

I. This Act may be called the Imperial
 Short title. Library (Indentures Validation) Act, 1902.

2. (1) Notwithstanding anything contained in the Societies
 Validation of inden- Registration Act, 1860, or in any other enact-
 tures set forth in sche- ment or rule of law for the time being in force,
 dules. the property expressed or intended to be trans-
 ferred to the Secretary of State for India in
 Council by the indentures, whereof copies are set forth in the first
 and second schedules, respectively, to this Act, shall be deemed and
 taken to have been so transferred absolutely as and from the dates of
 the said indentures are hereby declared valid and operative as from
 the said dates respectively.

(2) The said indentures shall be, and from the dates thereof
 respectively shall be deemed to have been, valid and binding for
 all purposes whatsoever, and as against all persons whomsoever
 claiming any right to, or any interest in, or any relief respecting
 the property, or any portion thereof, expressed or intended to be
 transferred thereby respectively, either as members of the Agricul-
 tural and Horticultural Society of India or of the Calcutta Public
 Library, or otherwise howsoever.

3. Notwithstanding anything herein contained, the property
 expressed or intended to be transferred to the
 Property to vest ab- Secretary of State for India in Council by the
 solutely in His Ma- said indentures respectively shall be, and from
 jesty. the dates thereof respectively shall be deemed to have been, vested
 in His Majesty absolutely and free from all incumbrances, trusts,
 powers, equities or obligations of any kind or nature whatsoever.

4. (1) A receipt signed by the person acting for the time being
 as the president of the said Agricultural and
 Certain receipts to discharge the Secretary of State in Council from liability. Horticultural Society of India for any money
 payable by the Secretary of State for India in
 Council to the said Agricultural and Horticul-
 tural Society under the indenture set forth in the first schedule,

shall effectually discharge the said Secretary of State in Council as regards the money therein expressed to be received, and from all liability in respect thereof; and the said Secretary of State in Council shall not be concerned to see to the application, or be responsible for any loss or misapplication of the same.

(2) A receipt signed by the person acting for the time being as the vice-president of the said Calcutta Public Library for any money payable by the Secretary of State for India in Council to the said Calcutta Public Library under the indenture set forth in the second schedule, shall effectually discharge the said Secretary of State in Council as regards the money therein expressed to be received, and from all liability in respect thereof; and the said Secretary of State in Council shall not be concerned to see to the application, or be responsible for any loss or misapplication, of the same

THE FIRST SCHEDULE.

THIS INDENTURE made the tenth day of April one thousand nine hundred and one between the *Agricultural and Horticultural Society of India* a Society registered under the provisions of Act XXI of 1860 of the Legislative Council of India (hereinafter called the said Society) of the first part, *Henry Cooper Eggar* of 1 Alipore Lane in the Suburbs of Calcutta Solicitor President of the said Society *David Prain M. A. M. B. F. R. S. C.* Superintendent of the Royal Botanic Garden Sibpur in the District of Howrah and a Major in the Indian Medical Service the Honourable *Francis Alexander Slacke B. A. J. P.* Member of the Indian Civil Service Secretary to the Government of Bengal in the General Revenue and Statistical Departments *Robert George Girard* of Ghoswary in the District of Howrah Collector of income Tax Bengal and *Joygobind Law C. I. E.* of 24 Sukeas Street Calcutta Zemindar the four Vice-Presidents of the said Society, *His Grace the Most Reverend Doctor Paul Count Goethals S. J.* Archbishop of Calcutta the Palace 12 Park Street Calcutta *Protapa Chundra Ghosha* of 26 Baranasi Ghose's Street Calcutta Zemindar *Francis Granville Clarke* of 4 Alipore Lane Calcutta Agent *Rajah Peary Mohun Mookerjee C. S. I.* of Utterpara in the District of Hooghly Zemindar *Edward Jeremiah King* of 9 Victoria Terrace Calcutta Broker *William Graham* of Garden Reach in the Suburbs of Calcutta Barrister-at-Law *Prosonno Coomar Banerjee Rai Bahadur* of Ariadah in the District of the Twenty-four Pergunahs Zemindar *John Ross Bertram* of 101 Clive Street Calcutta Merchant *William Dickson Cruickshank* of 2 Esplanade West Calcutta Banker *Owen Brochuvel Griffiths* of 3 Mangoe Lane

Calcutta Broker *Kailas Ohundras Basu Rai Bahadur C. I. E.* of 72 Sookhas Street Calcutta Doctor of Medicine, and *George Burgh McNair* of 1 Hastings Street Calcutta Solicitor, all Members of the said Society of the Second part, and *The Secretary of State for India in Council* (hereinafter called the Secretary of State) of the third part.

Whereas in the year one thousand eight hundred and forty at meetings of a Committee of subscribers to a fund raised with the object of perpetuating the name and administration of Sir Charles Theophilus Metcalfe Baronet (afterwards created Baron Metcalfe) Governor General of India to which fund the Agricultural and Horticultural Society of India as then constituted and the Society known as the Calcutta Public Library were contributors, it was resolved to erect a building in Calcutta of two storeys which should be devoted as to the lower storey thereof to the purposes of the said Agricultural and Horticultural Society of India and as to the upper storey thereof to the purposes of the Calcutta Public Library *And whereas* application having been made by the said Committee of subscribers to the Government of India for a suitable site for the building to be erected as aforesaid the piece or parcel of land in the schedule hereto particularly described was in the year one thousand eight hundred and forty made over by the Government of India to the said Agricultural and Horticultural Society of India and the said Calcutta Public Library subject only to the conditions following namely that the building to be erected thereon with the object and for the purposes aforesaid should be ornamental and substantial and that on failure on the part of the said Agricultural and Horticultural Society of India and the Calcutta Public Library to keep the said building in repair the said piece or parcel of land should revert to the Government of India or at least that the said building should not without the consent of the Government of India be alienable to other purposes than for the use of the said Agricultural and Horticultural Society of India and the said Calcutta Public Library *And whereas* thereafter by application of the balance of the said fund in the hands of the said Committee of subscribers augmented by further substantial contributions by the said Agricultural and Horticultural Society of India and the said Calcutta Public Library an ornamental and substantial building suitable for the purposes of the said Agricultural and Horticultural Society of India and the said Calcutta Public Library was erected on the said piece or parcel of land which building on the completion thereof was designated and has ever since been known as the Metcalfe Hall *And whereas* so far as is known no conveyance or other assurance of the said piece or parcel of land was at any time executed to or

in favour of the said Agricultural and Horticultural Society of India and the said Calcutta Public Library *And whereas* on the ninth day of September one thousand eight hundred and sixty-one the said Agricultural and Horticultural Society of India was registered under the provisions of Act XXI of 1860 of the Legislative Council of India and the said Society so registered is the said Society party hereto of the first part *And whereas* the said Society and the said Calcutta Public Library as at present constituted are possessed of and entitled in perpetuity to the said piece or parcel of land and the aforesaid building known as the Metcalfe Hall and the other out-buildings erected and being thereon as tenants in common in equal shares *And whereas* the said persons parties hereto of the second part are the present Council and governing body of the said Society *And whereas* the Secretary of State being desirous of acquiring the said Metcalfe Hall and other the land and buildings aforesaid an offer was recently made by the President of the said Society to and accepted by the Government of Bengal on behalf of the Secretary of State for the sale and transfer of the undivided moiety or half part or share of the said Society of and in the said Metcalfe Hall and land and buildings aforesaid to the Secretary of State for the price or sum of Rupees twenty-five thousand in cash and a permanent annuity of Rupees six thousand per annum such offer and acceptance being made subject to the approval and confirmation thereof by the said Society in general meeting *And whereas* at general meetings of the said Society duly convened and held in accordance with the bye-laws and regulations of the said Society on the fourteenth day of March one thousand and nine hundred and the twenty-seventh day of April one thousand and nine hundred the following resolution was passed namely that the conditional offer made by the President to and accepted by the Government of Bengal for the transfer to the Government of India of the right title and interest of this Society in the Metcalfe Hall property in consideration of a permanent annuity of Rupees six thousand unfettered by any conditions affecting its enjoyment and a sum of Rupees twenty-five thousand in cash be and is hereby adopted and confirmed and that the President be and is hereby authorised to carry such transfer into effect *Now this indenture witnesseth* that in consideration of the sum of Rupees twenty-five thousand on or before the execution of these presents paid by the Secretary of State to the said Society (the receipt whereof the said Society and the said persons parties hereto of the second part herein-after called the said governing body do hereby respectively acknowledge and therefrom do hereby respectively release the Secretary of State his successors in office and assigns) and also in consideration of the permanent annuity or clear yearly sum of Rupees six thousand to be hence-

forth paid by the Secretary of State his successors in office and assigns to the said Society or its assigns at the times and in the manner herein-after mentioned the said Society and the said governing body respectively do hereby grant and transfer unto the Secretary of State *All* that the one equal undivided moiety or half part or share of the said Society of and in all that piece or parcel of land more particularly described in the schedule hereunder written and the building known as the Metcalfe Hall and all the other out-buildings erected and being thereon *And also* of and in all ways passages drains rights privileges easements and appurtenances whatsoever to the said piece or parcel of land and buildings or any of them or any part thereof belonging or with the same now or heretofore held and enjoyed or reputed or known to be part or parcel thereof or appurtenant thereto *And* all the estate right title and interest claim and demand of the said Society into or upon the said premises or any part thereof *To have and to hold* the said one equal undivided moiety or half part or share and all other the estate right title and interest of the said Society of and in the said piece or parcel of land and buildings and all other the premises hereinbefore expressed to be hereby granted and transferred unto and to the use of the Secretary of State his successors in office and assigns for ever *And* the said Society and the said governing body for and on behalf of the said Society (but not so as to bind themselves personally) do hereby respectively covenant with the Secretary of State his successors in office and assigns that notwithstanding anything by the said Society at anytime done or knowingly suffered the said Society now have full power in manner aforesaid to grant and transfer the said one equal undivided moiety or half part or share of and in the said piece or parcel of land buildings and premises hereinbefore expressed to be hereby granted and transferred unto and to the use of the Secretary of State his successors in office and assigns *And* that the said one equal undivided moiety or half part or share of and in the said piece or parcel of land buildings and premises and every part thereof shall remain and be to the use of the Secretary of State his successors in office and assigns in the manner aforesaid and shall be quietly entered into and upon and held and enjoyed without any interruption claim or demand by the said Society or any person or persons claiming under or in trust for them *And* that discharged from or otherwise by the said Society sufficiently indemnified against all incumbrances claims and demands created by the said Society or any person or persons claiming or to claim through under or in trust for the said Society *And* that the said Society and every person claiming through under or in trust for them will at all times at the cost of the Secretary of State his successors in office or assigns executed and do all such assurances and

things for further or more effectually assuring the said one equal undivided moiety or half part or share of and in the said piece or parcel of land buildings and premises to the use of the Secretary of State his successors in office and assigns as shall be reasonably required And the Secretary of State doth hereby for himself and his successors in office covenant with the said Society and their assigns that he the said Secretary of State and his successors in office will henceforth and for ever pay to the said Society or their assigns an annuity or yearly sum of Rupees six thousand on the first day of April in every year and will make the first of such payments on the first day of April one thousand nine hundred and one and will make all the said payments without any deduction.

The schedule above referred to.

All that piece or parcel of land containing an area of 1 biggah 2 cottahs and 2½ chittacks or thereabouts situate and being No. 12 Strand Road in the Town of Calcutta and forming a portion of Holding No. 20 Block No. 23 in the South Division of the said Town and on which said piece or parcel of land or on some part thereof a building known as the Metcalfe Hall has been erected and which said piece or parcel of land and premises are bounded on the North by Hare Street on the East by the messuage godowns and premises known as No. 2 Church Lane belonging to Doorga Churn Law and Chundy Churn Law in the occupation of Messrs. Ralli Brothers on the South partly by the premises No. 11 Strand Road occupied by the Government Stationery Office and partly by the premises Nos. 3, 4 and 5 Church Lane in the occupation of the Government Jail Depot and Stationery Office and on the West by the Strand Road.

In witness whereof the said society have subscribed their name by their President and Secretary and the said persons hereto of the second part have hereunto set their hands and seals and the Secretary to the Government of India in the Home Department acting for and on behalf of the Secretary of State hath hereunto set his hand and seal the day and year first above written.

The name of the Agricultural and Horticultural Society of India has been subscribed by Henry Cooper Eggar the President for the time being of the said society and P. Lancaster the present Secretary of the said society in the presence of.

The Agricultural and Horticultural Society of India by

H. C. EGGAR,
President.
P. LANCASTER,
Secretary.

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Henry Cooper Eggar } H. C. EGGAR.
 in the presence of }

M. ABBOTT.

Solicitor, Calcutta.

Signed sealed and delivered by }
 the abovenamed David Prain M.A. } DAVID PRAIN.
 M.B. F.R.S.C. in the presence of }

E. J. BUTLER,

*Botanist,**Royal Botanic Garden, Sibpur.*

Signed sealed and delivered by }
 the abovenamed The Honourable Fran- } F. A. SLACKER.
 cis Alexander Slacke, B.A. J.P. in the }
 presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Robert George Girard } GEO. GIRARD.
 in the presence of }

OPENDRA CH. MOZOOMDAR,

*Deputy Magistrate and Deputy Collector,**Income-Tax Office.*

Signed sealed and delivered by }
 the abovenamed Joy Gobind Law C.I.E. } JOY GOBIND LAW.
 in the presence of }

M. ABBOTT,

Signed sealed and delivered by }
 the abovenamed His Grace The Most }
 Reverend Doctor Paul Count Goethals } † P. GOETHALS, S. J., ARCHBI-
 S.J. Archbishop of Calcutta in the } SHOP OF CALCUTTA.
 presence of }

L. PHILIPPART, S. J.,

Secretary to the Archbishop of Calcutta.

12 Park Street.

Signed sealed and delivered by the }
 abovenamed Protapa Chandra Ghosha } PROTAPA CHANDRA GHOSHA by
 in the presence of } his Attorney
 BHUPENDRA CH. GHOSHA.

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Francois Granville } F. G. CLARKE.
 Clarke in the presence of }

GEORGE L. SIDNEY,

Merchant.

Signed sealed and delivered by }
 the abovenamed Rajah Peary Mohun } PEARY MOHUN MOOKERJEE.
 Mookerjee C.S.I. in the presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Edward Jeremiah } E. J. KING.
 King in the presence of }

THOS. NICOLL,

Broker, Calcutta.

Signed sealed and delivered by }
 the abovenamed William Graham in } WILLIAM GRAHAM.
 the presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Prosonno Coomar } PROSONNO COOMAR BANNERJEE.
 Bannerjee Rai Bahadur in the pre- }
 sence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed John Ross Bertram } J. R. BERTEAM.
 in the presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed William Dickson } W. D. CRUICKSHANK.
 Cruickshank in the presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Owen Brochwel Grif- } O. B. GRIFFITHS.
 fiths in the presence of }

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed Kailas Chundra Basu } KAILAS CHUNDRA BASU.
 Rai Bahadur C.I.E. in the presence of

M. ABBOTT.

Signed sealed and delivered by }
 the abovenamed George Burgh McNair } GEO. B. MCNAIR.
 in the presence of

M. ABBOTT.

Signed sealed and delivered by }
 John Prescott Hewett Secretary to }
 the Government of India in the Home }
 Department for and on behalf of His } J. P. HEWETT,
 Excellency the Governor General of } *Secretary to the Government*
 India in Council acting in the premi- } *of India in the Home De-*
 ses for and on behalf of the Secretary } *partment.*
 of State for India in Council in the }
 presence of

H. ST. CLAIR FRÉITAS,

*Osry Nook,**Simla.*

Received the day and year first }
 above written of and from the }
 abovenamed The Secretary of }
 State for India in Council the }
 sum of rupees twenty-five thou- }
 sand being the amount above }
 expressed to be paid by him in }
 cash to the said society. }

Rs.
25,000.

Witness—

M. ABBOTT.

The Agricultural and Horticul-
 tural Society of India by

H. C. EGGAR,

President.

P. MANCASTER,

Secretary.

H. C. EGGAR.

Witness to the signatures of John }
 Ross Bertram, Francis Alex- }
 ander Slacks, Owen Brochwel }
 Griffiths, William Graham, }
 George Burgh Mc Nair and }
 William Dickson Cruickshank. }

J. R. BEETRAM.
 F. A. SLACKS.
 O. B. GRIFFITHS.
 WILLIAM GRAHAM.
 GEO. B. MCNAIR.
 W. D. CRUICKSHANK.

M. ABBOTT,

Solicitor, Calcutta.

THOS. NIQUOLL,

Broker, Calcutta.

GEOREG L. SIDDEY,

Merchant.

OPENDRA CH. MOZOOMDAR,

Dy. Magistrate and Dy. Collector.

E. J. BUTLER,

Botanist, Sibpur.

L. PHILIPPART, S. J.,

*Secretary to the Archbishop
 of Calcutta.*

E. J. KING.

F. G. CLARKE.

GEO. GIRARD.

DAVID PRAIN.

† P. GOETHALS, S. J.,
*Archbishop of
 Calcutta.*

12 Park Street.

THE SECOND SCHEDULE.

THIS INDENTURE made the twentieth day of December one thousand nine hundred and one *Between the Calcutta Public Library a Society* registered under the provisions of Act XXI of 1860 of the Legislative Council of India (hereinafter called the said Society) of the first part, *Maharajah Bahadur Sir Narendra Krishna K. C. I. E.* of No. 2 Raja Nubokisson Street Calcutta Zemindar the Vice-President of the said Society and as such the continuing trustee of the property of the said Society under the said Act and the Rules of the said Society of the second part, the said *Maharajah Bahadur Sir Narendra Krishna K. C. I. E.* as such Vice-President as aforesaid *Charles Elvin Dissent* of 61 Wellesley Street Calcutta Government Pensioner *Jogen Ohunder Dutt* of 171 Manicktollah Street Calcutta Attorney-at-Law and *Kali Ohurn Palit* of No. 2 Jagadishnath Roy's Lane Calcutta Vakil who collectively constitute the present Council of the said Society of the third part and the *Secretary of State for India in Council* (hereinafter called the Secretary of State) of the fourth part *Whereas* in the year one thousand eight hundred and forty at meetings of a Committee of subscribers to a fund raised with the object of perpetuating the name and administration of Sir Charles Theophilus Metcalfe Baronet (afterwards created Baron

Metcalfe) Governor-General of India to which fund the Calcutta Public Library as then constituted and a Society known as the Agricultural and Horticultural Society of India were contributors it was resolved to erect a building in Calcutta of two stories which should be devoted as to the lower storey thereof to the purposes of the said Agricultural and Horticultural Society of India and as to the upper storey thereof to the purposes of the Calcutta Public Library *And whereas* application having been made by the said Committee of subscribers to the Government of India for a suitable site for the building to be erected as aforesaid the piece or parcel of land in the second Schedule hereto particularly described was in the year one thousand eight hundred and forty made over by the Government of India to the said Calcutta Public Library and the said Agricultural and Horticultural Society of India subject only to the conditions following namely that the building to be erected thereon with the object and for the purposes aforesaid should be ornamental and substantial and that on failure on the part of the said Calcutta Public Library and Agricultural and Horticultural Society of India to keep the said building in repair the said piece or parcel of land should revert to the Government of India or at least that the said building should not without the consent of the Government of India be alienable to other purposes than for the use of the said Calcutta Public Library and the said Agricultural and Horticultural Society of India *And whereas* thereafter by the application of the balance of the said fund in the hands of the said Committee of subscribers augmented by further substantial contributions by the said Calcutta Public Library and the said Agricultural and Horticultural Society of India an ornamental and substantial building suitable for the purposes of the said Calcutta Public Library and the said Agricultural and Horticultural Society of India was erected on the said piece or parcel of which building on the completion thereof was called and has ever since been known as "The Metcalfe Hall" *And whereas* so far as is known no conveyance or other assurance of the said piece or parcel of land was at any time executed to or in favour of the said Calcutta Public Library and the said Agricultural and Horticultural Society of India *And whereas* on the twenty-third day of August one thousand eight hundred and seventy-one the said Calcutta Public Library was registered under the provisions of Act XXI of 1860 of the Governor-General in Council *And whereas* the said Secretary of State recently purchased from the Agricultural and Horticultural Society of India the interest of that Society in the said piece or parcel of land and the aforesaid building known as the Metcalfe Hall *And whereas* the said Society party hereto and the said Agricultural and Horticultural Society of India until the said purchase by the Secretary

of State were possessed of and entitled in perpetuity to the said piece or parcel of land and the aforesaid building known as The Metcalfe Hall and other the out-buildings erected and being thereon as tenants in common in equal shares *And whereas* by the Rules of the said Society party hereto it was in effect provided that any person who at the date of the making of the said Rules should be possessed of one or more original shares in the Society (shares which came into existence prior to the end of the year one thousand eight hundred and forty-nine) or who at the date of making the said Rules might have become or should thereafter become possessed of any share or shares in the said Society should be deemed a proprietor of the said Society *And whereas* the several persons named and described in the first Schedule to these presents are the present proprietors of the said Society *And whereas* by the said Rules it was also provided that the property of the said Society should be vested in Trustees for the benefit of the proprietors and the ratepayers of Calcutta represented by the Corporation of Calcutta as subscribers to the said Society and that the President and Vice-President for the time being should be such Trustees *And whereas* in accordance with the Rules of the said Society and until such time as the said Corporation of Calcutta withdrew their subscription to the said Society (as sometime since happened) the President of the said Society was nominated by the said Corporation and the Vice-President of the said Society was from time to time nominated by the said proprietors and on such nomination the said Officers were elected by the Council of the said Society in annual general meeting *And whereas* since the withdrawal by the said Corporation of Calcutta of their subscription to the said Society there has been no nomination and election of President of the said Society and the office President has been and is now still vacant and the present Vice-President of the said Society party hereto of the second part is now the sole continuing trustee of the property of the said Society *And whereas* it was by the said Rule further provided that the management of the said Society should be entrusted to a Council consisting of twelve members, of whom six should be elected by the said Corporation of Calcutta and the remaining six should be elected from amongst the said proprietors and the subscribers to the said Society any three of such members of Council to form a quorum *And whereas* since the withdrawal of the said Corporation of Calcutta of their subscription to the said Society as aforesaid the full number of members of the Council of the said Society has not been maintained and the persons parties hereto of the third part are the present members of the said Council *And whereas* the Government of India being desirous of forming an Imperial Library and for the purposes thereof of acquiring the said undivided moiety or half part or share of the said

Assigns for ever *And this Indenture further witnesseth* that for the consideration aforesaid the said Society and the said parties hereto of the second and third parts do hereby assign and transfer unto the Secretary of State his Successors in Office and Assigns ALL and singular the books and library shelves belonging to the said Society in and upon the premises hereinbefore expressed to be granted and transferred *And* all the right title and interest of the said Society to and in the same *To have hold* receive and take the said premises hereby assigned and transferred or expressed so to be unto the Secretary of State his Successors in Office and Assigns absolutely *And* the said Society and the said parties hereto of the second and third part for and on behalf of the said Society (but not so as to bind themselves personally) do hereby respectively covenant with the Secretary of State his Successors in Office and Assigns that not withstanding anything by the said Society at any time done or knowingly suffered the said Society now have full power in manner aforesaid to grant and transfer the said one equal undivided moiety or half part or share of and in the said piece or parcel of land hereditaments and premises hereinbefore expressed to be hereby granted and transferred unto and to the use of the Secretary of State his Successors in Office and Assigns and to assign and transfer the said books and premises hereinbefore expressed to be hereby assigned and transferred unto the Secretary of State his Successors in Office and Assigns *And* that the Secretary of State his Successors in Office and Assigns shall and may at all times hereafter peaceably and quietly possess and enjoy the said equal undivided moiety or half part or share of and in the said piece or parcel of land hereditaments and premises and every part thereof, and the said books shelves and premises and receive the rents issues and profits thereof respectively without any lawful eviction interruption claim or demand whatsoever from or by the said Society or any person or persons lawfully or equitably claiming under or in trust for them *And* that discharged from or otherwise by the said Society sufficiently indemnified against all incumbrances claims and demands created by the said Society or any person or persons lawfully or equitably claiming as aforesaid *And* that the said Society and every person claiming through under or in trust for them will at all times at the cost of the Secretary of State his Successors in Office or Assigns execute and do all such assurances and things for further or more effectually assuring the said one equal undivided moiety or half part or share of and in the said piece or parcel of land hereditaments and premises and the said books and premises unto and to the use of the Secretary of State his Successors in Office and Assigns respectively in manner aforesaid as shall be reasonably required *And this Indenture further witnesseth* that for the consideration aforesaid it is hereby agreed

by and between the said Society and the said parties hereto of the second and third parts for and on behalf of the several persons named and described in the said First Schedule to these presents and the Secretary of State for himself and his Successors in Office and Assigns as follows :—

1. From and after the formation of the said Imperial Library each of the said several persons proprietors of the said Society named and described in the said First Schedule to these presents shall during his lifetime and while he shall be in Calcutta have the privilege of taking out of the said Imperial Library for perusal at his place of residence such of the books hereinbefore expressed to be hereby assigned and transferred as he may from time to time require provided always that the books so taken at any one time shall not exceed six books or twelve volumes in number that all books so taken out shall be returned to the said Imperial Library within one calendar month and that the person or persons taking out any book or books in exercise of the aforesaid privilege shall be responsible for and shall make good to the Secretary of State all loss that may be sustained by reason of the non-return of any book or books or the return of any book or books in a damaged condition.

2. If after the formation of the said Imperial Library any of the books hereinbefore expressed to be hereby assigned and transferred shall not be required by or for the purposes of the said Imperial Library notice thereof together with a list of such books as shall not be required shall be given or sent to the parties hereto of the third part and if within such time as the Government of India shall deem reasonable a majority of the persons named and described in the said First Schedule to these presents shall create and open a Library in Calcutta for the reception thereof the books mentioned in the said list together with the shelves containing the same shall be made over and delivered by the Government of India free of cost to a Committee of the said persons appointed to receive the same for the purposes of the said Library subject to the express condition that the said books shall not be sold given away parted with or used for any purpose other than those of the said Library.

3. Should no library such as is referred to in the last preceding clause hereof be opened by the persons and within the time aforesaid or should such a library be opened and thereafter be disused or closed the books included in the list hereinbefore referred to but not the shelves containing the same may be distributed amongst or made over to such libraries or library in Calcutta as either upon the recommendation of the majority of the persons named and described in the said First Schedule to these presents or in their own discretion the Government of India may select and as may be willing to receive the same.

The First Schedule referred to in the foregoing Indenture.

PART I.

List of Properties holding Transferable shares.

1. Apar, J. G., Esq. ... Clerk of the Crown, High Court, Calcutta.
2. Biswas, Kaliprasana, Babu ... Banian, Calcutta.
3. Chatterjee, Amarendra Nath, Babu ... Vakil, High Court, Calcutta.
4. Deb, Satya Priya, Babu ... Asst., Board of Revenue, Calcutta.
5. DePenning, G. A., Esq. ... Gentleman, Calcutta.
6. Dey, Nilmoney, Babu ... Gentleman, Cossipore.
7. Dhur, Ashutosh, Babu ... Attorney-at-law, Calcutta.
8. Dutt, J. C., Esq., M.A., B.L. ... — do. — do.
9. „ Joges Chandra, Babu ... Gentleman, Calcutta.
10. „ Kader Nath, Babu ... — do. — do.
11. „ Khetra Mohan, Babu .. Banian, Calcutta.
12. „ Mano Mohan, Babu, Vakil, High Court, Calcutta.
M.A., B.L.
13. „ Satis Chandra, Babu ... Gentleman, Calcutta.
14. Ghosh, Jojendra Chandra, Babu. Zemindar, Garden Reach.
15. „ Munindra Chandra, Babu Gentleman, Calcutta.
16. „ Naba Krishnan, Babu... Gentleman, Salkeah, Howrah.
17. Ghosh, Pratapa Chandra Babu, B.A. Gentleman, Calcutta.
18. Howe, Rivers, T. L., Esq. ... Asst. Controller-Genl. incharge of Paper Currency Dept., Calcutta.
19. Law, Jaygobind, Babu, C.I.E. Zemindar, Calcutta.
20. Martin, John, Esq. ... Of the firm of Messrs. John Davies & Co., Calcutta.
21. Mitra, Prakas Chunder, Babu, L.M.S. Medical Profession, Calcutta.
22. Mullick, Binod Behari, Babu. Zemindar, Calcutta.
23. Narendra, Krishna, Maharajah Bah. dur, Sir, K.C.I.E. Zemindar, Calcutta.

24. Palit, Kali Churn, Babu, B.L. Pleader, Police Court, Calcutta.
25. Pandit, Ram Chundra, Babu. Gentleman, Bhowanipore.
26. Ray, Annada Mohan Babu ... Zemindar; — do. —
27. „ Gobinlal, Babu ... Gentleman, Calcutta.
28. Rowland, Mrs. Geo. Henry ... Calcutta.
29. Sen, Narayan Kissen, Babu ... Store-Keeper, Stamp Office, Calcutta.
30. Set, Balailal, Babu ... Gentleman, Calcutta.
31. „ Giris Chandra, Babu, Attorney-at-law, Calcutta.
M A., B.L.
32. Sircar, Mohendrolal, Dr .M.D., Medical Profession, Calcutta.
- & 33. D.L., C.L.E., (holds 2 shares).
34. Sturmer, Miss Anne ... Zemindar, Calcutta.
35. Tagore, Debendra Nath, Babu. Zemindar, Calcutta.
36. „ Jagadindra Nath, Babu. — Do. — do.
37. „ Jotendra Mohun, Maharajah Bahadoor, Sir, K.C.S.I.
38. Thompson, Walter Alex. John, Chandmari Tea Estate, Nagra Esq. Kata P. O., via Jalpaiguri; West Doonars.
39. Woodburn, Hon'ble Sir John, Lieutenant-Governor of Bengal. K.C.S.I.
40. Robinson, C. C., Esq. ... Barrister-at-law, Calcutta.
41. Stuart, J N., Esq. ... Of the firm of Messrs Balmer, Lawrie & Co.
42. Westland, Sir James, K C.S.I. Late Finance Minister, India.

PART II.

Transferable shares in Abeyance.

43. Basu, Dwarkanath, Babu .. Gentleman, Calcutta; died in 1898.
44. Holinbury, Robert Heatly, — Do. — do.— died in Esq. 1896.
- 45 • Mitra, Gopi Kissen, Babu ... — Do. — do.— died in 1896.
- 46. „ Romes Chundra, Sir, Kt. — Do. — do.— died in 1899.

47. Sen, Beni Madhab, Babu ... Gentleman, Calcutta, died in 1899.
48. Mitra, Jagganath, Babu ... Assistant, Appellate Side, High Court, Calcutta; died in 1901.

PART III.

List of proprietors holding non-transferable shares.

49. Baker, J. W., Esq. ... Of the Firm of Messrs. Bairy & Co., Calcutta.
50. Bonand, A, Esq. ... Merchant, Calcutta.
51. Dissent, C. E., Esq. ... Gentleman, Calcutta.
52. Duncan, W. N., Esq. ... Of the firm of Messrs. Stewart. Mackenzie & Co., Calcutta.
53. Ghosh, Kali Krishna, Babu ... Gentleman, Bankipore, Patna.
54. Mannk, Mrs. M. ... Calcutta.
55. Robertson, J. A., Esq. ... Gentleman, Chandernagore.
56. Tagore, Kali Kissen, Babu ... Zemindar, Calcutta.
57. Mitter, Jotendranath, Babu ... Gentleman, Calcutta.

The Second Schedule referred to in the foregoing Indenture.

- All that piece or parcel of land situate and being No. 12, Strand Road in the Town of Calcutta and a portion of Holding No. 20, Block No. 23 in the Southern Division containing an area of 1 bigha 2 cottahs and 2½ chittacks or thereabouts whereon or on some part whereof has been erected a building known as the Metcalfe Hall and which said piece or parcel of land and premises are bounded on the North by Hare Street on the East by the messuage and godowns belonging to Doorga Churn Law and Chundy Churn Law in the occupation of Messrs. Ralli Brothers on the South by the premises occupied by the Government Stationery Office and on the West by Strand Road.

In Witness whereof the said Society have subscribed their name by their Vice-President and Secretary and the said persons hereto of the second and third parts have hereunto set their hands and seals and the Secretary to the Government of India in the Home Department acting for and on behalf of the Secretary of State has hereunto set his hand and seal the day and year first above written.

The name of the Calcutta Public Library has been subscribed by Maffa-
 raja Bahadur Sir Norendra Krishna,
 K.C.I.E. the Vice-President for the time
 being of the said Society and Surat
 Chunder De, the present Secretary of
 the said Society in the presence of

The Calcutta Public Library
 by NORENDRA KRISHNA,
Vice-President.
 S. C. DE,
Honorary Secretary,
C. P. Library.

M. ABBOTT,

Solicitor, Calcutta.

Signed, sealed and delivered by
the abovenamed Maharaja Bahadur
Sir Norendra Krishna, K.O.I.E., as
party hereto of the second and third
parts in the presence of

NARENDRA KRISHNA.

M. ABBOTT.

Signed, sealed and delivered by the
abovenamed Charles Elwin Dissent in
the presence of

C. E. DISSENT.

A. BOOTH, *Spinster,*
61 Wellesley, Street,

Signed, sealed and delivered by
the abovenamed Jogen Chunder Dutt
in the presence of

J. C. DUTT.

M. ABBOTT.

Signed, sealed and delivered by the
abovenamed Kali Churn Palit in the
presence of

KALI CHURN PALIT.

M. ABBOTT.

Signed, sealed and delivered by
John Prescott Hewett, Secretary to the
Government of India in the Home De-
partment for and on behalf of His Ex-
cellency the Governor-General of India
in Council acting in the premises for
and on behalf of the Secretary of State
for India in Council in the presence of

JOHN PRESCOTT HEWETT,
*Secretary to the Government
of India, Home Department.*

H. C. EGGAR.

Solicitor to the Government of India.

Received the day and year first above written of and
from the Government of India the sum of Twenty-eight
thousand and five hundred being the full consideration
money above expressed to be paid by him to us for dis-
tribution amongst the several persons proprietors of the
said Society named and described in the First Schedule
to these presents or the heirs executors administrators
or assigns of such of the said persons as are named and
described in the first and second parts of the said

Schedule in the proportions in the said Schedule mentioned 28,500

Witness—

M. ABBOTT.

The Calcutta Public Library by

NARENDRA KRISHNA,

Vice-President.

S. C. DE.,

Honorary Secretary,

C. P. L.

NARENDRA KRISHNA,

C. E. DISSENT.

J. C. DUTT.

KALI CHARAN PALIT.

H. W. C. CARANDUFF,

Offg. Secretary to the Govt. of India.

Schedule in the proportions in the said Schedule mentioned 28,500

Witness—

M. ABBOTT.

The Calcutta Public Library by

NARENDRA KRISHNA,

Vice-President.

S. C. DE,

Honorary Secretary,

C. P. L.

NARENDRA KRISHNA,

C. E. DISSENT,

J. C. DUTT.

KALI CHARAN PAL.

H. W. C. CARANDUFF.

Offg. Secretary to the Govt. of India.

ACT No. II of 1902.

THE CANTONMENTS (HOUSE-ACCOMMODATION)

ACT, 1902.

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*An Act to make better provision for securing house-accommodation
for military officers in Cantonments.*

WHEREAS various conditions, rules, regulations and orders have from time to time been laid down by or by the authority of, the Government, in regard to the grant of land and the occupation of land and houses in cantonments, with the object of securing, amongst other things, that houses built on such land should be made available when required for the accommodation of military officers;

And whereas, notwithstanding the said conditions, rules, regulations and orders, difficulties have frequently been experienced in obtaining house-accommodation in cantonments for military officers, and it is expedient to make better provision for that purpose;

It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title, extent
and commencement

1. (1) This Act may be called the
Cantonments (House-Accommodation) Act,
1902.

(2) It extends to the whole of British India (inclusive of British Baluchistan), except Aden; and

(3) It shall come into force at once, but it shall not become operative in any cantonment or part of a cantonment until the issue, or otherwise than in pursuance, of a notification as hereinafter provided by section 3.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

- (a) "Cantonment Authority" means a Cantonment Committee, or, in the case of a cantonment for which such a Committee has not been constituted, or has ceased to exist, or cannot be convened, the Commanding Officer of the cantonment :
- (b) "Command" means one of the principal portions into which the army of India is for the time being divided :
- (c) "General Officer of the Command" means the General Officer commanding the forces in a Command :
- (d) "house" means a house suitable for occupation by a military officer, and includes the land and buildings appurtenant to such house :
- (e) "military officer" means a commissioned or warrant officer of His Majesty's regular forces on military duty in a cantonment, and includes a Chaplain, a Cantonment Magistrate and any person in Army departmental employment whom the General Officer of the Command may at any time, for the purposes of this Act, place on the same footing as a military officer :
- (f) "owner" includes the person who is receiving, or is entitled to receive, the rent of any house, whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent, or be entitled to receive it, if the house were let to a tenant : and
- (g) the expression "repairs" to a house includes such repairs as are usually made to houses in the neighbourhood, but does not include additions, improvements or alterations, except in so far as they are necessary to carry out such repairs as aforesaid or have been made with the owner's consent.

(2) If any question arises whether any land or building is appurtenant to a house, it shall be decided by the Cantonment Magistrate, whose decision thereon shall, subject to revision by the District Magistrate, be final.

CHAPTER II.

APPLICATION OF ACT.

3. (1) The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, declare this Act to be operative in any cantonment or part of a cantonment situate in the territories under its administration, other than a cantonment situate within the limits of a Presidency-town.

Cantonments, or parts of Cantonments, in which Act to be operative.

(2) Before issuing a notification under sub-section (1) in respect of any cantonment or part of a cantonment, the Local Government shall cause local inquiry to be made with a view to determining whether it is expedient to issue such notification and what portion (if any) of the area proposed to be included therein should be excluded therefrom.

4. Nothing in this Act shall affect the provisions of any written instrument executed by or on behalf of the East India Company or the Government, unless the other party entitled and the Secretary of State for India in Council consent in writing to be bound by the terms of this Act.

Saving of written instruments.

CHAPTER III.

APPROPRIATION OF HOUSES FOR OCCUPATION BY MILITARY OFFICERS.

5. Every house situate in a cantonment or part of a cantonment in respect of which a notification under section 3, sub-section (1), is for the time being in force, shall be liable, subject to the provisions hereinafter contained, to appropriation at any time for occupation by a military officer.

Liability of houses to appropriation for occupation by military officers.

6. Where the Cantonment Authority, on application made to it as hereinafter provided by section 8 and subject to the requirements of that section, considers that the liability imposed by section 5 should be enforced on behalf of military officer, it may, if the house is not already occupied by a military officer, by notice,—

Appropriation of house for military officer, where not already occupied by a military officer.

(a) require the owner to let the house to the military officer named in the notice, and

(b) require the existing occupier (if any) to vacate the same.

7. If a house is already occupied by departmental military officer, and the Cantonment Authority, on

Appropriation of house for regimental military officer, where already occupied by departmental military officer.

application made to it as hereinafter provided by section 8 and subject to the requirements of that section, considers that the liability imposed by section 5 should be enforced on behalf of a regimental officer, or *vice versa*, it may, by notice, require the officer in occupation to vacate the house; and may, if necessary, by further notice require the owner to accept the change of tenancy.

8. (1) Where a military officer considers that a notice should be issued in his behalf under section 6 or section 7, as the case may be, he may request the Commanding Officer of his regiment, or (in the case of a departmental military officer) the local head of his department, to make an application to that effect to the Cantonment Authority.

Procedure to be observed before appropriating house.

be issued in his behalf under section 6 or section 7, as the case may be, he may request the Commanding Officer of his regiment, or (in the case of a departmental military officer) the local head of his department, to make an application to that effect to the Cantonment Authority.

(2) On receipt of an application made under sub-section (1), the Cantonment Authority shall inquire into the case, and it shall not issue the notice applied for unless it is satisfied.—

(a) that it is necessary or expedient for the military officer to reside in the cantonment, or, if this Act is in force in part of the cantonment only, then in that part;

(b) that the circumstances are such as to require its intervention;

(c) that the monthly rent proposed for the house is reasonable; and

(d) that the house is suitable for the residence of the officer and, if it is occupied, that there is no vacant house in the cantonment or the said part of the cantonment, as the case may be, which is suitable for his residence.

Explanation I.—Where the rent of a house is registered in the office of the Cantonment Authority, the rent so registered shall be presumed, until the contrary is shown, to be the reasonable rent for the house.

Explanation II.—In considering whether a house is suitable for the residence of a military officer, regard shall be had to—

- (i) the locality in which his duties chiefly lie,
- (ii) his rank, and
- (iii) the number of persons dependent upon, and residing with, him.

9. Every notice to an owner issued under section 6 or section 7 shall state the amount of monthly rent proposed as reasonable for the house.

10. (1) No house in any cantonment or part of a cantonment in which this Act has been declared by a notification under section 3, sub-section (1), to be operative shall, unless it was so occupied at the date of such notification, be occupied for the purposes of a hospital, bank, hotel, shop or school, or by a railway administration, without the previous sanction of the General Officer of the Command, given with the concurrence of the Local Government.

(2) Before application is made for such sanction as aforesaid, the Commanding Officer of the cantonment shall certify whether or not in his opinion the number of houses in the cantonment, as compared with the strength of the existing or probable garrison, renders it likely that such occupation as aforesaid would—

- (a) cause any difficulty in obtaining accommodation in the cantonment, or in the part of the cantonment in which the house is situate, for military officers, or
- (b) necessitate the acquisition of land at some future time for the extension of the cantonment.

11. No notice shall be issued under section 6, if the house—

Houses not to be appropriated for military officers in certain cases.

- (a) was occupied prior to the date of a notification under section 3, sub-section (1), declaring the Act to be operative in the cantonment, or part of the cantonment, or is occupied with the sanction required by section 10,

as a hospital, bank, hotel, shop or school, and has been so occupied continuously during the three years immediately preceding the time when the occasion for issuing the notice arises, or

- (b) was occupied prior to the date of such a notification as is referred to in clause (a), or is occupied, with the sanction aforesaid, by a railway administration, or
- (c) is occupied by the owner, or
- (d) is appropriated by the Local Government, with the concurrence of the General Officer of the Command, or by the Governor-General in Council, for use as a public office or for any other purpose.

12. (1) If a house is unoccupied, a notice issued under section 6 may require the owner to give possession of the same to the proposed tenant within four days from the service of the notice.

Time to be allowed for giving possession of house.

(2) If a house is occupied, a notice issued under section 6 or section 7 shall not require its vacation in less than 30 days from the service of the notice.

13. If the owner fails to give possession of a house to the proposed tenant in pursuance of a notice issued under section 6 or section 7, or if the existing occupier fails to vacate a house in pursuance of such a notice, the Cantonment Magistrate, by himself or by another person generally or specially authorized by him in this behalf, shall enter on the premises and enforce the surrender of the house.

Surrender of house when to be enforced.

Option in certain cases for owner on whom notice is issued under section 6 or section 7 to call upon the military officer concerned or the Government to purchase.

14. (1) If a house in respect of which a notice is issued under section 6 or section 7 is shown to the satisfaction of the Local Government, or is proved by a decree or order of a Court of competent jurisdiction, to have been erected—

- (a) under any conditions, rules, regulations or orders which were in force in Bengal prior to the eighth day of December 1864, and conferred on the owner the option

of offering the house for sale to the military officer applying for its appropriation for his occupation or to the East India Company or the Government, or

- (b) under any conditions, rules, regulations or orders which were in force in Bombay prior to the first day of June 1875, and conferred such an option as is described in clause (a),

then the owner shall have the option of either complying with the notice or offering the house for sale to the military officer in whose behalf the notice was issued, or to the Government.

(2) If the owner elects to sell the house, and such military officer or the Government is willing to purchase it, the amount of the purchase-money to be paid shall, in the event of disagreement, be determined by a Committee of Arbitration.

15. (1) If a house is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year, or from year to year, no notice shall be issued under section 6 or section 7 without the previous sanction of the Officer Commanding the District.

Provision where tenant required to vacate holds under a long lease.

(2) If a house in respect of which a notice is issued under section 6 or section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year, the Secretary of State for India in Council shall, for the term of one year from the date on which the house is vacated in pursuance of the notice, or for the unexpired term of the lease, whichever is the shorter, be liable to the owner for the rent payable under this Act or, if no rent is so payable, for the rent fixed by the registered lease.

(3) If a house, in respect of which a notice is issued under section 6 or section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease from year to year, the Secretary of State for India in Council shall be liable as aforesaid for the term of six months from the date on which the house is vacated in pursuance of the notice.

(4) Nothing in this section shall be deemed—

- (a) to render the said Secretary of State in Council so liable unless an application in writing in this behalf is made by the owner to the Cantonment Authority within fifteen days from the service of the notice; or
- (b) to limit or otherwise affect any agreement between the said Secretary of State in Council and the owner.

16. (1) Subject to the terms of any agreement in writing between an owner and a military officer, and to the provisions of this section, every lease of a house to such an officer shall be deemed to be a lease from month to month, terminable,—

Terms of tenancy applicable to military officers.

- (a) without notice, in the case of a Committee of Arbitration deciding, as hereinafter provided, that the house has become unfit for occupation,
- (b) by half a month's notice to the owner, in the case of the departure of the officer from the cantonment on duty or under medical certificate, and
- (c) by one month's notice to the owner, in any other case.

(2) The Cantonment Magistrate shall, if the military officer so desires, cause the notice required by sub-section (1), clause (b) or clause (c), to be served on the owner.

(3) Where a military officer has, in pursuance of sub-section (1), clause (a), given up his occupation of a house without notice and has occupied the house during a portion only of the calendar month in which his occupation ceased, he shall be liable to pay as rent for that portion a sum bearing the same proportion to the monthly rent as the said portion bears to the whole month.

(4) Where a notice in respect of a house has been issued under section 6 or section 7 and the house has been vacated in pursuance thereof, the tenancy of the military officer in whose behalf the notice was issued, shall be deemed to have commenced on the date on which the house was vacated.

17. If the tenant of a house, being a military officer, sub-lets the same without the consent of the owner, the sub-lease shall be voidable at the option of the owner.

Sub-lease voidable at option of owner.

18. (1) If the owner considers that the rent stated in a notice in accordance with section 9 is not reasonable, he may, within a period of fifteen days from the service of such notice, require that the matter be referred by the Commanding Officer of the cantonment to a Committee of Arbitration.

Power for owner to require reference to arbitration on question of rent.

(2) If the owner does not make such a requisition within the said period, he shall be deemed to have accepted the rent so offered.

(3) The rent fixed by a Committee of Arbitration or accepted by the owner under this section shall be deemed to be the rent payable by the military officer in whose behalf the notice was issued, as from the commencement of his tenancy, and the amount of such rent shall not be called in question by either party, except in the circumstances mentioned in section 21, clause (a).

19. (1) If the owner fails to execute any repairs to a house which the tenant, being a military officer, considers necessary, the Cantonment Authority may, at the request of the tenant and if it is satisfied that such repairs or any of them are necessary, by notice require the owner to execute such repairs, or such of them as it may consider necessary, within a period, not less than fifteen days, to be specified in the notice.

Power for owner to require reference to arbitration on question of repairs.

(2) If the owner objects to comply with a notice issued under sub-section (1), he may, within fifteen days from the service of the notice, require that the matter be referred by the Commanding Officer of the cantonment to a Committee of Arbitration.

20. If the tenant of a house, being a military officer, considers that his lease should be terminable without notice in consequence of the house having become unfit for occupation, he may require that the matter be referred by the Commanding Officer of the cantonment to a Committee of Arbitration.

Power for military tenant to require reference to arbitration on question whether house has become unfit for occupation.

Power for either owner or military tenant to require reference to arbitration on other questions.

21. If the owner and the tenant of a house, being a military officer, disagree—

- (a) as to any change in the rent of the house which is proposed in consequence of dilapidations or additions to buildings or for any other similar reason, or
- (b) on any matter relating to rent or repairs not otherwise provided for by this Act,

either the owner or the tenant may require that the matter be referred by the Commanding Officer of the cantonment to a Committee of Arbitration.

Power for military tenant to have repairs executed and recover cost.

22. Where—

- (a) the owner fails to comply with a notice issued under section 19, sub section (1), and has not, within fifteen days from the service of such notice, required that the matter be referred to a Committee of Arbitration, or
- (b) a Committee of Arbitration decides that repairs are necessary and the extent to which they are necessary, and specifies the period within which they are to be executed, and the owner fails to execute them within such period,

the Military Works Services or the Public Works Department shall, on the application of the tenant of the house, being a military officer, cause the repairs specified in the notice or, if the matter has been referred to a Committee of Arbitration, in the decision of the Committee, to be executed at the expense of the tenant, and the tenant may deduct the cost thereof from the rent, or otherwise recover it from the owner.

23. Every person on whom devolves, by transfer, by succession or by operation of law, the interest of an owner in any house, or in any part of any house, situate in a cantonment or part of a cantonment in respect of which a notification under section 3, sub-section (1), is for the time being in force, shall be bound to give the Cantonment Magistrate notice of the fact within one month from the date of such devolution, and, if he, without reasonable cause, fails to do so, shall be punishable with fine which may extend to fifty rupees.

Notice to be given of devolution of interest in house in cantonment.

CHAPTER IV.

COMMITTEES OF ARBITRATION.

24. In the event of any disagreement as to the amount of the purchase-money of a house to be sold under section 14, sub-section (2), the Cantonment Authority shall apply to the Commanding Officer of the cantonment to refer the matter to a Committee of Arbitration, and the Commanding Officer of the cantonment shall forthwith proceed to convene a Committee of Arbitration to determine it.

Convening of Committees of Arbitration in cases falling under section 14, sub-section (2).

25. Where a requisition is made to the Commanding Officer of the cantonment by an owner under section 18, section 19 or section 21, the Commanding Officer of the cantonment shall forthwith proceed to convene a Committee of Arbitration—

Convening of Committees of Arbitration on requisition of owners.

- (a) to determine the amount of monthly rent to be paid, or
- (b) to determine whether any, and (if any) what, repairs are necessary, the extent to which they are necessary, and the period within which they are to be executed, or
- (c) otherwise to determine the question in dispute.

26. (1) Where a requisition is made to the Commanding Officer of the cantonment by a military officer under section 20 or section 21, the Commanding Officer of the cantonment may, after such inquiry as he may think fit to make, proceed to convene a Committee of Arbitration—

Convening of Committees of Arbitration on requisition of military officers.

- (a) to determine whether the house has become unfit for occupation, or
- (b) to determine the amount of monthly rent to be paid, or
- (c) to determine whether any, and (if any) what, repairs are necessary, the extent to which they are necessary, and the period within which they are to be executed, or
- (d) otherwise to determine the question in dispute.

(2) In the exercise of the discretion vested in him by sub-section (1), the Commanding Officer of the cantonment may refuse

to convene a Committee of Arbitration on the ground that the application therefor is groundless or frivolous.

Procedure for convening Committees of Arbitration generally.

27. (1) Where a Committee of Arbitration is to be convened, the commanding Officer of the cantonment shall forthwith cause an order to be published in Station Orders, stating the matter to be determined.

(2) The Cantonment Magistrate shall forthwith send a copy of such order to the District Magistrate and to the parties concerned, and shall forthwith by notice require the parties to nominate members of the Committee in accordance with the provisions of sections 28 and 29.

Constitution of Committees of Arbitration.

28. Every Committee of Arbitration shall consist of—

- (a) a chairman, who shall be the District Magistrate, or, if the District Magistrate is unable to act on the Committee, some Magistrate, being a Justice of the Peace or Magistrate of the first class, and not being the Cantonment Magistrate, appointed by the District Magistrate to act in his stead;
- (b) a member to be nominated by the military officer concerned; and
- (c) a member to be nominated by the owner concerned:

Provided that, if the military officer and the owner, at any time before the meeting of the Committee, join in nominating, by notice to the Cantonment Magistrate, any other person as chairman, such person shall be the chairman instead of the District Magistrate or the Magistrate (if any) appointed by the District Magistrate under clause (a); and

Provided, also, that,—

- (i) if the officer or the owner fails, without reasonable cause, to nominate a member within seven days from the date on which he may be called upon to do so; or,
- (ii) if any member, who has been nominated, neglects or refuses to act, and the officer or the owner, as the case

may be, fails to nominate another member in his place within seven days from the date on which he is called upon to do so,

the District Magistrate shall forthwith appoint a member in the place of the nominee of the officer or owner, as the case may be.

29. (1) No person who has a direct interest in the matter under reference or whose services are not immediately available for the purposes of the Committee; shall be nominated or appointed a member of a Committee of Arbitration.

Members of Committees of Arbitration to be persons who have no direct interest and whose services are immediately available.

(2) If any person who has been nominated has, in the opinion of the District Magistrate, a direct interest in the matter under reference, or if his services are not immediately available as aforesaid, and if the officer or the owner, as the case may be, fails to nominate another member in his place within seven days from the date on which he is called on so to do, such failure shall be deemed to constitute a failure to make a nomination within the meaning of section 28.

30. (1) When a Committee of Arbitration has been duly constituted, the Cantonment Magistrate shall by notice inform each of the members of the fact, and the Committee shall meet as soon as may be thereafter.

Meeting and powers of Committees of Arbitration.

(2) The Committee shall have power to receive evidence and to administer oaths to witnesses, and the Cantonment Magistrate shall issue the necessary processes for the attendance of witnesses and the production of documents required by the Committee, and may enforce the said processes as if they were processes for attendance or production before himself.

31. The chairman of the Committee of Arbitration shall fix the time and place of meeting, and shall have power to adjourn the meeting from time to time, as may be necessary.

Powers of chairman of Committee of Arbitration as to meetings.

32. In determining the amount of the purchase-money to be paid for a house to be sold under section 14, sub-section (2), the Committee of Arbitration convened under section 24

Calculation of amount of purchase-money by Committees of Arbitration.

shall estimate the market-value of the house at the date on which the notice was served on the owner under section 6 or section 7, as the case may be.

33. Subject to the presumption mentioned in the first explanation to section 8, in determining the amount of monthly rent to be paid for a house, the Committee of Arbitration shall estimate the letting-value of the house, and shall have regard to, amongst other things, the circumstances of the neighbourhood and the period of time and season for which the house is likely to be occupied during the year.

Calculation of rent by
Committees of Arbitration.

34. (1) The decision of every Committee of Arbitration shall be in accordance with the majority of votes taken at a meeting at which the chairman and at least one of the other members are present.

Decisions of Committees
of Arbitration.

(2) If there is not a majority of votes in favour of any proposed decision, the opinion of the chairman shall prevail.

(3) The decision of a Committee of Arbitration shall be final.

CHAPTER V.

APPEALS.

35. (1) If any owner or any tenant of a house is aggrieved by a notice issued under section 6 or section 7, he may appeal to the General Officer of the Command.

Appeal when allowed.

(2) No such appeal shall be admitted unless made within a period of twenty-one days from the service of the notice aforesaid, and such period shall be computed in accordance with the provisions of the Indian Limitation Act, 1877, with respect to the computation of periods of limitation thereunder.

36. (1) Every petition of appeal shall be in writing and accompanied by a copy of the notice appealed against.

Petition of appeal.

(2) Any such petition may be presented to the Cantonment Authority; and that Authority shall be bound to forward it to the General Officer of the Command, and may attach thereto any report which it may desire to make in explanation of the notice appealed against.

(3) If any such petition is presented direct to the General Officer of the Command and an immediate order on the petition is not necessary, the General Officer of the Command may refer the petition to the Cantonment Authority for report.

Order in appeal final.

37. The decision of the General Officer of the Command on any such appeal shall be final :

Provided that no appeal shall be decided until the appellant has been heard or has had a reasonable opportunity of being heard.

38. Where an appeal from a notice has been presented within the period prescribed by section 35, subsection (2), all action on such notice shall, on the application of the appellant, be held in abeyance pending the decision of the appeal.

Suspension of action pending appeal.

CHAPTER VI.

SUPPLEMENTAL PROVISIONS.

39. (1) If a military officer is given possession of a house in pursuance of a notice issued under section 6 or section 7, the rent payable by such officer under this Act shall be registered by the Cantonment Authority in a register to be maintained in such form as the Local Government may, by rule, prescribe.

Recovery of rents from military tenants in cantonments.

(2) If such officer fails, before the fifteenth day of any month, to pay the rent so registered and due from him in respect of the month immediately preceding, the Cantonment Authority, if so satisfied, shall, on the application of the owner made before the end of the later month, report the matter, through the proper channel, to the Officer Commanding the District.

(3) The Officer Commanding the District may, if he is satisfied that the amount claimed is still due, order that it be withheld from the salary and allowances of the defaulting officer, and, upon

notice of the order to the officer whose duty it is to disburse such salary and allowances, such disbursing officer shall, unless such salary and allowances are under attachment by order of a Civil Court, withhold and remit to the Cantonment Authority, for payment to the owner, the amount specified in the order.

(4) If, within two months from the date of an application made by the owner under sub-section (2) on which the Officer commanding the District has made an order under sub-section (3), the amount of the rent in respect of which such application and order were made is not paid to the owner, the Cantonment Magistrate shall, on the application of the owner, require the defaulting officer to vacate the house within four days, and, if such officer fails to do so, the Cantonment Magistrate shall, by himself or by another person generally or specially authorized by him in this behalf, enter on the premises and enforce the surrender of the house.

40. Every notice or requisition prescribed by this Act shall be in writing, signed by the person by whom it is given or made or by his duly appointed agent, and may be served by post on the person to whom it is addressed, or, in the case of an owner who is absent from the cantonment, on his agent appointed under section 226 of the Cantonment Code, 1899.

Service of notices and requisitions.

41. (1) The Governor General in Council may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) regulate the procedure of Committees of Arbitration; and
- (b) define the powers of inspection and entry which may be exercised in carrying out the purposes and objects of this Act or of any rule thereunder.

42. (1) The power to make rules under section 41 shall be subject to the condition of the rules being made after previous publication and of their not taking effect until they have been

Further provisions respecting rules.

published in the Gazette of India and in such other manner (if any) as the Governor General in Council may direct.

(2) Any rule under section 41 may be general for all cantonments or parts of cantonments in British India in which this Act is for the time being operative, or may be special for any of such cantonments or parts, as the Governor-General in Council may direct.

(3) A copy of the rules under section 41 for the time being in force in a cantonment shall be kept open to inspection free of charge at all reasonable times in the office of the Cantonment Authority.

(4) In making any rule under section 41, sub-section (2), clause (b), the Governor General in Council may direct that whoever obstructs any person, not being a public servant within the meaning of section 21 of the Indian Penal Code, in making any inspection or entry, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with fine which, in addition to such fine as aforesaid, may extend to five rupees for every day after the first during which such offence continues.

43. No Judge or Magistrate shall be deemed, within the meaning of section 556 of the Code of Criminal Procedure, 1898, to be a party to, or personally interested in, and prosecution for an offence against any rule under this Act merely because he is a member of the Cantonment Committee or has ordered or approved the prosecution.

Inapplicability of section 556 of the Code of Criminal Procedure, 1898 to trials of offences against rules.

44. No suit or other legal proceeding shall lie against any person for anything done, or in good faith intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act.

Protection to persons acting under Act.

H. W. C. CARNDUFF,

Offg. Secy. to the Govt. of India, Leg. Dept.

(Republished by order of His Excellency the Governor in Council.)

C. J. WEIR,

Ag. Secy. to Govt., Leg. Dept.

Acts of the Governor of Fort St. George in Council.

MADRAS ACT NO. I OF 1902.

THE MADRAS COURT OF WARDS ACT, 1902.

[Received the assent of His Excellency the Governor on the 22nd February 1902, and that of His Excellency the Viceroy and Governor-General on the 7th May 1902.]

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MADRAS ACT No. I OF 1902.

An Act to consolidate and amend the law relating to the Court of Wards in the Madras Presidency.

Preamble. WHEREAS it is expedient to consolidate and amend the law relating to the Court of Wards in the Presidency of Madras; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title. 1. This Act may be called the Madras Court of Wards Act 1902.

Extent. It extends to the Presidency of Madras exclusive of the scheduled districts.

Laws repealed. 2. Section 25 of the Madras Collectors Regulation, 1803, the Madras Court of Wards Regulation, 1804, the Madras Minors Act, 1855, and the Madras Court of Wards (Amendment) Act, 1899, are hereby repealed.

Jurisdiction of High Court saved. 3. Nothing in this Act shall be construed to affect or in any way to derogate from any power possessed by the High Court of Madras over the persons and estates of infants, idiots and lunatics.

Definitions. 4. In this Act, unless there is something repugnant in the subject or context :

"Court." "The Court" means the Court of Wards.

"Ward." "Ward" means a person who has been made a ward of the Court under section 19.

"Minor." "Minor" means a person who, under the provisions of the Indian Majority Act, 1875, as amended by section 52 of the Guardians and Wards Act, 1890, has not attained majority.

"Proprietor." "Proprietor" means a person who owns or has a life interest in land either solely or as a co-sharer.

CHAPTER II.

THE COURT OF WARDS.

Court of Wards. 5. The Board of Revenue shall be the Court of Wards for the territories to which this Act extends, and for the purposes of this Act, Collectors shall be subject to the control of the Court.

6. The Court of Wards shall be subject to the control of the Control of Local Government Local Government and the Local Government may, if it thinks fit, revise, modify or reverse any order passed or proceedings taken under this Act, whether a petition is presented against such order or proceedings or not.

7. (1) Sections 2, 3 and 4 of the Madras Board of Revenue Distribution of business. Act, 1894, shall, so far as may be, apply to the Board of Revenue when exercising jurisdiction as the Court of Wards.

(2) It shall in all cases be lawful for a Secretary of the Secretary may sign for Court. Board of Revenue to sign on behalf of the Court.

8. The Court may exercise all or any of the powers conferred on it by this Act through the District Collectors in whose districts any part of the property of the ward may be situated or through any other person whom it may appoint for the purpose; and may confer any of its powers on any such Collector or person and withdraw any powers so conferred. Powers of Court how exercised.

CHAPTER III.

ASSUMPTION OF SUPERINTENDENCE OF PERSONS AND PROPERTY.

9. The following proprietors shall be deemed to be disqualified Disqualification. for the management of their property:—

- (a) Minors.
- (b) Women declared by the Local Government to be incapable of managing their property.
- (c) Proprietors adjudged by a competent civil court to be of unsound mind and incapable of managing their property.
- (d) Proprietors declared by the Local Government to be incapable of managing their property owing to any physical or mental defect or infirmity rendering them unfit to manage their property.

10. (1) Whenever a Collector receives information that a Immediate protection of disqualified heirs. proprietor of land situated in his division or district has died, and he has reason to believe that the heir of such proprietor is, or should be declared to be, disqualified under section 9,—

- (a) he may take such steps and make such order as he thinks proper for the temporary custody and protection of the property which he has reason to believe to belong to the heir; and
 - (b) if the heir be a minor he may direct that the person, if any, having custody of the minor, shall produce him or cause him to be produced, at such place and time, and before such person, as he appoints, and may make such order for the temporary custody and protection of the minor as he thinks proper.
 - (c) Female minors who ought not to be compelled to appear in public shall be produced in accordance with the manners and the customs of the country.
- (2) If the Collector taking action under sub-section (1) is not the District Collector, he shall report the matter forthwith to the District Collector, who shall decide whether to direct the Collector to withdraw, or himself to report the matter to the Court as provided in section 12.

Recovery of
expenditure.

11. All expenses incurred by a Collector, acting under section 10, shall, whether the property is afterwards taken under the superintendence of the Court or not, form a charge upon the property concerned, and shall be recoverable from the owner of such property, or the person whom the Collector shall find to be in possession of such property, as an arrear of land revenue.

Report by
District
Collector.

12. Whenever any District Collector, after making such inquiry as he deems necessary, has reason to believe that any proprietor in his District is, or should be declared to be, disqualified under section 9, he shall submit a report to the Court setting forth all the circumstances of the case. Provided that in the case of proprietors of land on which the annual revenue payable to Government is less than Rs. 10,000 or of which the annual rent value as defined in the Madras Local Boards Act, 1884, is less than Rs. 20,000, the District Collector need not report the case to the Court unless he is of opinion that the Court ought to assume the superintendence of the property. Provided also that the Court or the Local Government may call for a report on any case if it thinks fit.

13. (1) Before reporting to the Court under section 12 that a proprietor ought to be declared to be disqualified under clause (b) or (d) of section 9, the District Collector shall give notice to such proprietor and afford him a reasonable opportunity to be heard and to adduce evidence.

Proprietor to be given opportunity to be heard and to adduce evidence.

(2) All questions as to whether the provisions of this section have been complied with shall be decided finally by the Local Government.

14. The Court shall consider the Collector's report, and except in the case of female proprietors, not being minors, whom it decides to leave in charge of their property, shall report the case to the Local Government with its recommendation and pending the receipt of orders shall have power to take such steps as it may deem necessary for the protection of the person and property of the proprietor in question.

Report by Court.

15. The Local Government, on receipt of the Court's recommendation, may in any case falling under clause (b) or (d) of section 9 declare the proprietor to be disqualified, and in any case falling under section 9 may order the Court to assume the superintendence of the person or property of the proprietor or of both.

Local Government may declare proprietor disqualified and direct Court to assume superintendence.

16. The Local Government shall not declare any proprietor to be disqualified under clause (d) of section 9 unless satisfied that it is expedient in the public interests that his property should be managed by the Court, and a statement to this effect shall be inserted in the declaration made by the Local Government as provided in section 15.

Proprietor not to be declared disqualified under section 9 (d) unless on ground of public interests.

17. (1) The Local Government shall not order the Court to take the property of an undivided Hindu family under its superintendence unless all the co-parceners are, or are declared to be, disqualified under section 9.

Provision to meet case of undivided Hindu families and co-sharers.

(2) When two or more proprietors are co-sharers otherwise than as co-parceners in an undivided Hindu family and one of such co-sharers is, or is declared to be, disqualified under section 9, the Local Government may order the Court to institute a suit for partition on behalf of the disqualified proprietor and to take under its superintendence the property allotted to such proprietor in the partition.

Application
by proprietor
himself.

18. A proprietor may make application to the Local Government to have his property placed under the superintendence of the Court, and the Local Government may, on being satisfied that it is expedient in the public interests that such property should be managed by the Court, make a declaration to that effect and order the Court to assume the superintendence of such property.

Notification
of assumption
of superin-
tendence.

19. (1) Whenever under section 15 or 18 the Local Government orders the Court to take under its superintendence the person or property of a proprietor or both, such order of the Local Government together with any declaration made under the aforesaid sections shall be notified in the *Fort St. George Gazette* and also in the Gazette of the district in which such property or any portion thereof is situate. The notification shall specify the District Collector who shall discharge the duties imposed upon a Collector by this Act in respect of such person or property or both as the case may be.

Consequences
of such notifi-
cation.

(2) Such proprietor shall be deemed to have become a ward under the Court, from the date of the said order of the Local Government and the superintendence of his person or property or of both shall take effect from the said date, and as to property shall extend to all moveable and immoveable property belonging to him at the date of the order, or to which he shall afterwards become in any way entitled, whilst he continues under such superintendence. Provided that it shall be in the discretion of the Court to assume or refrain from assuming the superintendence of any property which the ward may acquire otherwise than by inheritance subsequent to the date of the order of the Local Government under section 15 or 18.

CHAPTER IV.

MANAGEMENT AND GUARDIANSHIP.

Collector to
take charge
of ward's
property.

20. When the Court has assumed the superintendence of the property of a ward, the District Collector specified in the notification under section 19, or if so directed by the Court, the Collector of the district in which any part of the property is situated shall take possession and custody of such property on behalf of the Court.

21. It shall be lawful for such Collector.—

- (a) to order any person in possession of any moveable property to the possession of which the ward is entitled or of any accounts or papers relating to the property of such ward, to deliver up such moveable property, accounts or papers. Powers of Collector in so doing.
- (b) in case there is reason to believe that any moveable property to the possession of which the ward is entitled or any accounts, or papers relating to the property of the ward are to be found in any room, box, or receptacle within any house in the actual possession of the ward, to break open such room, box or receptacle or authorize the same to be broken open for the purpose of searching for such property, accounts or papers;
- (c) to order any person who is or has been in the employ of the ward, and any person who was in the employ of the deceased proprietor, if any, from whom the ward derives his title, to attend before him for examination; and to defray the necessary expenses of any person so attending out of the assets of the estate;
- (d) to order all holders of tenures and under-tenures on the ward's property to produce their titles before him.

22. The Court may determine what sums shall be allowed for the expenses of the ward and of his family and dependants. Allowances for ward and family.

23. The Court may make such orders and arrangements, as to it may seem fit, in respect of the custody, residence, education and marriage :— Custody, residence, education and marriage of ward or minor relatives.

- (a) of any ward whose person is for the time being under its superintendence,
- (b) of any minor child, minor brother, or minor sister of such ward, who, in the opinion of the Court, is entitled to maintenance at the charge of the ward's estate,
- (c) of the ward's next male heir being a minor and also so entitled to maintenance.

Appointment,
 &c., of
 managers
 and guar-
 dians.

24. (1) The Court may appoint managers for the property, and guardians for the person, of any ward, and may control or remove any manager or guardian so appointed.

Provided that it shall not appoint a guardian for any person who has become a ward in pursuance of an order under section 18.

(2) Any appointment made under this section shall terminate when the Court ceases to exercise superintendence over the person for whom a guardian, or over property for which a manager, has been appointed.

Collector
 to act if
 there are
 none.

25. If no manager of the property or guardian of the person of a ward is appointed by the Court, or the office is temporarily vacant, the District Collector specified in the notification under section 19, or any other Collector whom the Court may appoint in this behalf, shall be competent, under the control of the Court, to do anything that might be done by such manager or guardian.

Who may
 and may not
 be guardians.

26. (1) No person being the next legal heir of a ward, or appearing to have a direct or indirect advantage in the death or continued disqualification of such ward, shall be appointed guardian of such ward.

Provided that the mother of a ward, or any person appointed guardian by the will of a person authorized to make such appointment may be appointed guardian by the Court at its discretion.

(2) A female guardian shall be appointed for a female ward, and a male guardian for a male ward above seven years of age, unless, in any case, the Court, for special reasons, shall direct otherwise.

Provided that no guardian shall ordinarily be appointed for a female ward if she has an adult husband.

Duties of
 guardians.

27. A guardian appointed under section 24 shall be charged with the custody of the ward, and, subject to the control of the Court, shall make suitable provision for his maintenance and health, and, if he be a minor, for his education, and for such other matters as are required by the personal law to which the ward is subject, and shall:—

- (a) give such security (if any), as the Court thinks fit, for the due performance of his duty;
- (b) submit such accounts as the Court may direct;

- (c) pay the balances due from him thereon;
- (d) continue liable to account to the Court after he has ceased to be guardian for his receipts and disbursements during the period of his guardianship;
- (e) apply for the sanction of the Court to any act which may involve expense, not previously sanctioned by the Court;
- (f) be paid such allowance out of the property of the ward as the Court thinks fit.

28. Every manager appointed by the Court shall have power, ^{Powers of} subject to the control of the Court, to collect the rents of land ^{manager.} placed under his charge, as well as all other money due to the ward, and to grant receipts therefor, and may, under the orders of the Court, grant or renew such leases as may in his opinion be necessary for the good management of the property, and do all such lawful acts as he may be generally or specially authorised by the Court to do for the good management of the property.

29. Every manager appointed by the Court shall manage the ^{Duties of} property placed under his charge diligently and faithfully and ^{manager.} shall :—

- (a) give such security, if any, as the Court thinks fit, duly to account for what he may receive in respect of the rents and profits of the property under his charge;
- (b) keep such accounts in such form and submit them at such times as the Court may direct;
- (c) deal with all moneys received by him in such manner as the Court may direct;
- (d) apply for the sanction of the Court to any act which may involve the property in expense not previously sanctioned by the Court;
- (e) be responsible for any loss occasioned to the property by his negligence or wilful default;
- (f) continue liable to account to the Court after he has ceased to be manager for his receipts and disbursements during the period of his managership;
- (g) be paid such allowance out of the property of the ward as the Court thinks fit.

• Employees of
Court deemed
to be public
servants.

30. Every guardian, manager, or other servant of the Court, shall be deemed to be a "public servant" within the meaning of sections 161, 162, 163, 164 and 165 of the Indian Penal Code, and in the definition of legal remuneration contained in the said section 161, the word "Government" shall, for the purposes of this section, be deemed to include the Court.

Manager and
other
servants to be
deemed to be
public
accountants
and amenable
to Regulation
IX of 1822.

31. Every manager or other servant of the Court entrusted with the receipt, custody or control of moneys or securities for money on behalf of the Court or with the management of any property under its superintendence shall be deemed to be a public accountant within the meaning of the Public Accountants' Default Act, 1850, and shall be amenable to the provisions of the Madras Revenue Malversation Regulation, 1822, as if he were a native servant of the Collector's public establishments.

Regulation of
expenditure.

32. Unless the Court otherwise directs, all moneys received by, or on behalf of, the Court on account of the property of any ward, shall be employed in meeting the charges included in Class I hereinafter specified before it is employed in meeting the charges in Classes II and III hereinafter specified, and in meeting the charges in Class II before it is employed in meeting those in Class III.

Class I.

Charges necessary for the maintenance, residence, education, marriage and indispensable religious observances of the ward and his family.

Charges necessary for the management and supervision of the property of the ward.

Charges on account of Government revenue and of all cesses and other public demands due in respect of such property, or any part of such property.

Class II.

Charges on account of rent, cesses or demands due to any superior landholder in respect of any land held on behalf of the ward.

The liquidation of debts payable by the ward.

Expenses necessary to protect the interests of the ward in the civil courts or otherwise.

The maintenance in efficient condition of the estates, buildings and other immoveable property and the suitable upkeep of the furniture, equipage, live-stock and other moveable property belonging to the ward.

Class III.

The payment of such charges for the religious observances of the ward and his family and of such religious, charitable and other allowances, and of such donations befitting the position of the ward's family, as the Court may authorize to be paid.

The prevention and relief of distress among the ward's tenantry.

The improvement of the land and property of the ward and the benefit of the ward and his property generally.

33. Any surplus which remains after providing, so far as the Court deems fit for the objects mentioned in section 32, shall be applied in the purchase of other landed property, or invested at interest on the security of—

- (a) promissory notes, debentures, stock and other securities of the Government of India;
- (b) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India;
- (c) stock, or debentures of, or shares in, railways or other companies, the interest whereon has been guaranteed by the Secretary of State for India in Council;
- (d) debentures, or other securities for money, issued by, or on behalf of, any local authority under the authority of any Act of a Legislature, established in British India;
- (e) such other securities, stock, or shares guaranteed by the Government of India, or the Local Government as the Court shall deem fit; or
- (f) first mortgages of immoveable property situate in British India, provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third or if consisting of buildings, exceeds by one-half, the mortgage money.

Disabilities
of wards.

34. A ward shall not be competent—

- (a) to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court, or to enter into any contract or to make any acknowledgment involving him in pecuniary liability personally or in respect of such property :

but nothing in this clause or in section 23 shall be deemed to affect the capacity of a ward to enter into a contract of marriage : provided that he shall not incur in connection therewith any pecuniary liability, except such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court may, in writing, declare to be reasonable :

- (b) to grant valid receipts for the rents and profits arising or accruing from such property or for debts or other moneys due to the estate :
- (c) to adopt or to give a written or verbal permission to adopt, without the consent of the Court :
- (d) to dispose of his property by will without the consent of the Court :

Provided first, that the Court shall not withhold its consent under clause (c) or (d) if the adoption or testamentary disposition is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation.

Provided, secondly, that the Court may confirm a will or an adoption made, or a permission to adopt given, without its previous consent.

Provided, thirdly, that the provisions of clauses (c) and (d) shall not apply to any proprietor in regard to whose property a declaration has been made under section 18.

35. The Court may mortgage or sell the whole or any part of any property under its superintendence and may give leases or farms of the whole or any part of such property for such terms as it thinks fit, and may make remissions of rent or other dues, and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the advantage of the ward or for the benefit of the property.

Powers of
Court as to
property
under its
superintend-
ence.

36. The Court may order such establishments to be employed and charges to be incurred as it shall consider requisite for the care and management of the persons and properties under its superintendence, and generally for all the purposes of this Act, and may order that such charges shall be borne by and distributed amongst the said properties in such proportions as it deems fit.

CHAPTER V.

ASCEBTAINMENT AND SETTLEMENT OF DEBTS.

- 37.** (1) On the publication of a notification under section 19, the District Collector therein specified may, at any time with the previous sanction of the Local Government, publish in the Gazette of the district or districts in which such property may be situate a notice in English and in the vernacular calling upon all persons having pecuniary claims, whether immediately enforceable or not against the ward or his property to notify the same in writing to the Collector within six months from the date of such notification.
- (2) The notice shall also be published at such places and in such other manner as the Court may, by general or special order, direct and shall be sent by registered post to every person who is known to the Collector as having a pecuniary claim against the ward or his property and of whose address the Collector is credibly informed.
- (3) The Local Government may at any stage of the proceedings under sections 37, 38 and 40 invest any person either by name or in virtue of his office with the powers of a Collector for any or all of the purposes of these sections.

Explanation.—A claim shall be deemed to be pecuniary for the purpose of this section and sections 38 and 41 notwithstanding that a suit for its enforcement or a reference of such claim to arbitration is pending, or that a decree or award has been passed establishing the same.

- 38.** (1) Every such claimant shall, within the period prescribed by section 37, notify to the Collector in

Establishments and distribution of charges.

Notice calling upon claimants to notify claims.

Claimants to furnish full particulars and documents.

writing his claim with full particulars thereof; provided that any claim presented after the expiration of such period and within a further period of six months may be admitted if the claimant satisfies the Collector that he had sufficient cause for not notifying the claim at an earlier date.

- (2) Every document (including entries in books of account) in the possession of or under the control of the claimant on which he founds his claim, shall be produced before the Collector with the statement of claim or within such time after the preferring of the claim as may be allowed by the Collector in that behalf; provided that if the claim relates to an amount secured by a decree or award, it shall be sufficient for the claimant to produce before the Collector a certified copy of the decree and a certificate from the Court which passed or is executing the same declaring the amount recoverable thereunder, or a true copy of the award and a statement of the sum recoverable thereunder as the case may be; and if the claim is pending adjudication in any Court or has been referred to arbitration, it shall be sufficient for the claimant to produce a certified copy of the plaint or a true copy of the reference to arbitration as the case may be.
- (3) It shall be lawful for the Collector to require the production by any claimant of such of the documents in his possession or power relating to his claim other than the documents if any produced under sub-section (2) as the Collector may consider necessary.
- (4) Unless the Collector shall otherwise direct, every document produced under this section shall be accompanied by a true copy thereof. The Collector shall mark the original document for the purpose of identification and, after examining and comparing the copy with it, shall retain the copy and return the original to the claimant.

Pecuniary
claim of
Government,
&c., not
affected.

39. Nothing contained in sections 37 and 38 shall apply to any pecuniary claim of Government or any local authority, or to claims for maintenance or for wages or salaries due to servants.

40. The Collector shall, after making such inquiry as he may deem fit, decide which claims notified or admitted under section 38 are to be allowed in whole or in part, and which are to be disallowed, and, on his decision being confirmed by the Court, shall give written notice of the same to the claimants. Provided that nothing herein contained shall be construed as precluding any claimant from continuing or instituting proceedings in any civil court in respect of any claim whether such claim be allowed or disallowed by the Court in whole or in part.

41. Every pecuniary claim against the ward or his property which has not been duly notified to, or admitted by the Collector under section 38 shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the expiration of the period prescribed by section 37 and shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38.

42. No document in the possession or under the control of the claimant which should have been, but has not been, produced in accordance with the requirements of section 38 shall be admissible in evidence against the ward or his representative in any suit brought by or against the claimant, or any person claiming under him unless it be proved to the satisfaction of the civil court that it was not within his power to produce such document before the Collector.

43. (1) When any property of award is in the possession of a mortgagee, or any person claiming under a mortgagee, the Local Government may, on being satisfied that it is expedient in the public interests that the estate should be preserved and that such incumbrancer should deliver up possession of the mortgaged property, make a declaration to that effect, and direct the Court to take possession thereof; the Court shall, thereupon by an order in writing, require such incumbrancer to deliver up possession of the same to the manager at the end of the then current revenue year.

(2) If such incumbrancer refuses or neglects to obey such order, the Collector may, without resorting to a civil

court, enter upon the property, and summarily evict therefrom the said incumbrancer and any other person obstructing or resisting on his behalf.

- (3) The dispossession of the incumbrancer under sub-sections (1) and (2) shall not deprive him of any summary powers which he would have had under the Madras Rent Recovery Act, 1865, for the recovery of arrears of rent due to him at the date of his dispossession.
- (4) If in the instrument of mortgage under which the incumbrancer is in possession of the property, no rate of interest is specified, the Collector shall in cases where the mortgage debt has been notified to or admitted by him, offer to the incumbrancer the rate of interest which appears to him to be reasonable; and pass an order fixing the rate accordingly. Copy of the order shall be served upon the incumbrancer in the manner prescribed by the Code of Civil Procedure for service of summons upon a defendant. If the incumbrancer be dissatisfied with the rate of interest so fixed, he may, within three months from the date of service upon him of such order, institute a suit against the ward in a district court within whose jurisdiction the property mortgaged or any portion thereof is situate, and the said court shall, if the mortgage debt has been notified or admitted as aforesaid, pass a declaratory decree fixing such rate of interest as to it may seem reasonable. If no such suit be instituted within the said period, the incumbrancer shall be deemed to have agreed to the rate fixed by the Collector.
- (5) If an incumbrancer is dispossessed under this section, the money due to him under the instrument of mortgage at the date of such dispossession together with subsequent interest on the unliquidated principal of the mortgage debt at the rate stipulated in the said instrument, and in the absence of such stipulation at the rate determined as hereinbefore provided, shall, subject to the provisions of section 41, and subject to the charges

specified in classes I and II in section 32, excepting the liquidation of debts payable by the ward, and the provisions with reference to the upkeep of the furniture, equipage, livestock and other moveable property belonging to the ward, be recoverable, together with any money which he may be legally entitled to add to the principal money, on the security of the property mortgaged and of the rents and profits arising or accruing therefrom subsequent to the date of such dispossession, in the same manner as if he were a simple mortgagee under the said instrument of such property and of such rents and profits.

- (6) The Collector shall, as soon as conveniently may be, after the expiration of the revenue year commencing with the date of such dispossession and of every successive revenue year declare, subject to the approval of the Court, the gross annual rents and profits realized from such property, the several heads of expenditure and the balance and such declaration shall be conclusive evidence of the statements therein contained. A copy of such declaration shall be furnished to the dispossessed incumbrancer free of charge.

44. (1) When any property of a ward is in the possession of any person claiming to hold under a lease granted by the ward and dated within the three years immediately preceding the commencement of the superintendence, or of any person claiming under such lessee, the Collector may inquire into the sufficiency of the consideration for which the lease was granted; and if such consideration appears to him inadequate, he may, with the previous sanction of the Court, give notice in writing that the lease shall determine at the end of the then current revenue year unless the lessee or any one claiming under him pays or agrees to pay such additional consideration as may be mentioned in such notice within a date therein fixed. If within such date such person does not pay or enter into an agreement to pay the additional consideration demanded, or such other
- Provision regarding leases for insufficient consideration.

consideration as the Collector may be willing to accept, the lease shall determine at the end of the then current revenue year.

Provided that such person may, if dissatisfied with the said notice of the Collector, institute a suit against the ward within the three months from the date of service of such notice in a district court within whose jurisdiction the property comprised in the lease or any portion thereof is situate for determining whether the consideration for the lease was adequate and if not whether the additional consideration demanded by the Collector or what other amount is reasonable.

- (2) If the said district court be satisfied that the lease was granted for adequate consideration and it is not shewn to be otherwise invalid, it shall pass a decree establishing the validity of the lease.
- (3) If the district court holds the consideration for the lease to be inadequate, it shall determine the amount of additional consideration to be paid by the lessee.
- (4) If no such suit be instituted or if on the institution of such suit the lessee does not within one month from the date of the decree therein pay or enter into an agreement to pay the additional consideration, determined by the district court, the Collector may without resorting to a civil court enter upon the property and summarily evict therefrom such person and any other person obstructing or resisting on his behalf.

Execution of
decrees to be
transferred
to Collector
in certain
cases.

45. (1) In the case of any specified ward of the Court, the Local Government may, with the previous sanction of the Governor-General in Council, declare by notification in the official Gazette that execution of decrees passed by civil courts, which are capable of execution by sale of any immoveable property of such ward, or which in pursuance of a contract specifically affecting any such immoveable property order the sale of the same, whether such decrees be passed prior to such notification or subsequent thereto, shall be transferred to the Collector of the district in which such property or any portion thereof is situate and rescind such notification.

Provided that when a portion only of a decree passed by a civil court is of the description aforesaid, such portion alone shall be transmitted to the Collector for execution.

(2). The Local Government may also notwithstanding anything contained in the Code of Civil Procedure prescribe rules for the transmission of the decree from the civil court to the Collector, and for regulating the procedure of the Collector in executing the same, and for retransmitting the decree from the Collector to the civil court.

(3) Rules under this section may confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which a civil court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the civil court under sections 294 and 312 of the Code of Civil Procedure and may provide for orders passed by the Collector or any gazetted subordinate of the Collector or orders passed on appeal with respect to such orders, being subject to appeal to and revision by superior revenue authorities as nearly as may be as the orders passed by the civil court, or orders passed on appeal with respect to such orders, would be subject to appeal to and revision by appellate or revisional civil courts under the Code of Civil Procedure or other law for the time being in force if the decree had not been transferred to the Collector.

(4) A power conferred by the rules upon the Collector, or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the civil court which passed the transferred decree or by any civil court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the aforesaid civil court.

(5) In executing a decree transferred to the Collector under this section, the Collector shall be deemed to be acting judicially within the meaning of the Judicial Officers' Protection Act, 1850.

46. (1) When the Collector, to whom the execution of any decree has been transferred under section 45, is also the Collector who has to discharge the other functions of a Collector under this Act in respect of the ward against whom such decree has to be executed, the Local Government shall appoint some other person

Collector to whom execution of decree has been transferred to cease to discharge the

functions of
a Collector
under the
Act,

by name or in virtue of his office to exercise the functions of a Collector under this Act in respect of such ward other than the execution of the decrees transferred to him.

(2) The Board of Revenue may authorize the person so appointed to exercise all or any of the powers conferred on a revenue officer in charge of a division by sub-section (2) of section 16 of the Madras Proprietary Estates' Village Service Act, 1894.

Certain provisions of Civil Procedure Code to be applicable to execution of decrees transferred to Collector.

47. The provisions of sections 321, 322, 322A, 322B, 322C, 322D, 323, 324, 324A, 325, 325A, 325C of the Code of Civil Procedure, shall, subject to the provisions of this Act and to such rules as may be prescribed by the Local Government under section 45, be applicable as far as may be to the execution of decrees transferred under section 45.

CHAPTER VI.

SUITS.

Exercise of discretion not to be questioned in civil court.

48. No declaration made by the Local Government under section 15 or 18 and no act done in the exercise of any discretionary power conferred by this Act shall be questioned in any civil court.

Suit not to be instituted until after notice to Collector.

49. (1) No suit relating to the person or property of any ward shall be instituted in any civil court until the expiration of two months after notice in writing has been delivered to or left at the office of the District Collector specified in the notification under section 19 or the Collector appointed under section 46, as the case may be.

(2) Such notice shall state the name and place of abode of the intending plaintiff, the cause of action and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

Provided that notice under this section shall not be required in the case of any suit the period of limitation for which will expire within three months from the date of the notification under section 19.

Suit in civil court to be in

50. (1) Every ward shall sue and be sued in the civil court in the name of the District Collector specified in the notification

under section 19 or the Collector appoint under section 46, as the case may be. name of Collector;

(2). In suits or proceedings under the Madras Rent Recovery Act, 1865, and any other Act under which suits may be heard by, or proceedings had before, the Collector, the ward shall sue and be sued in the name of the manager in charge of his property. and in revenue court to be in name of manager.

51. If in any such suit or proceedings any civil or revenue court shall decree any costs against the Collector or manager, the Court of Wards shall cause such costs to be paid out of any property of the ward, which, for the time being, may be in its hands. Costs against Collector or manager how paid.

52. No suit shall be brought on behalf of any ward by the Collector or manager, unless authorized by some particular or general order of the Court. Suits must be authorized by Court.

Provided that a manager in the name of the Collector or in his own name, as the case may be, may file a plaint in order to prevent a suit from being barred by the law of limitation, but such suit shall not be further proceeded with, until the consent of the Court has been obtained.

53. (1) When any question arises as between two or more wards of such a nature that an adjudication upon it by a civil court is expedient, it shall be lawful for the Court of Wards, acting through the Collector of the district in which a case might have been stated for the opinion of the civil court with regard to such matter under section 527 of the Code of Civil Procedure, to file in the civil court having jurisdiction, a statement containing the point or points for determination. Adjudication of civil disputes between two or more wards.

(2) When such statement has been filed, the civil court shall appoint a guardian *ad litem* for each ward having a separate interest, and such guardians shall thereupon conduct the case subject to the general control of the Court of Wards.

(3) The civil court may, if it thinks fit, amend the case so stated and shall then proceed to hear and dispose of the case in the manner provided in Chapter XXXVIII of the Code of Civil Procedure for the hearing and disposal of cases stated for opinion under that chapter.

CHAPTER VII.

RELEASE OF PERSONS AND PROPERTY FROM SUPERINTENDENCE.

Release from
superintend-
ence.

54. The Court may, with the previous sanction of the Local Government, in all cases where superintendence has been assumed in pursuance of orders under section 15, at any time release from its superintendence the person or property of a ward or both and shall save as provided in section 57 release from superintendence—

- (a) the person and property of a ward disqualified under clause (a) of section 9 as soon as he ceases to be a minor ;
- (b) the person and property of a ward disqualified under clause (c) of section 9 as soon as it is found by a competent civil court that the disability has ceased ;
- (c) the person and property of a proprietor declared to be disqualified under clause (b) or (d) of section 9 as soon as the Local Government revokes its declaration that such proprietor is disqualified ;
- (d) the property of an undivided Hindu family, and the person of every co-parcener therein who is not possessed of separate estate, as soon as any co-parcener ceases to be disqualified under section 9.

Release of
estates taken
under man-
agement
under section
18 when debts
cannot be
liquidated
within rea-
sonable time.

55. (1) The Court may, with the previous sanction of the Local Government, at any time within two years from the date of the notification published under section 19, release from its superintendence, on a day to be notified, the property of a person who has been made a ward of the Court in pursuance of an order under section 18 without liquidating any of his debts and liabilities or after liquidating some of the debts and liabilities, when the Court is satisfied that it is impracticable to liquidate within a reasonable time all the debts and liabilities or such of them as have not been liquidated and in either case the legal incapacity of such ward shall cease on the date so notified.

2. Whenever an incumbrancer is dispossessed under section 43, and his debt remains unliquidated at the time, the Court releases from its superintendence the property of such ward under sub-section (1), the Collector shall replace the incumbrancer in possession.

3. Whenever the property of a person is released under sub-section (1) from the superintendence of the Court, the provisions of sections 41 and 42 shall not apply to any of the debts and liabilities of the ward remaining unliquidated at the time when his property is so released.

4. In computing the period of limitation applicable to a suit brought or application made against such person or his legal representative after the Court has released his property under sub-section (1) the time during which the superintendence of the Court continued shall be excluded.

56. The Court may, with the previous sanction of the Local Government, replace any proprietor made a ward of the Court in pursuance of an order under section 18, in the management of his estate, on a day to be notified if the debts and liabilities binding on his estate have been discharged, and the Court is satisfied that he will thereafter be competent to take charge of his estate and administer his own affairs and his legal incapacity shall cease on such date.

When estate taken under management under section 18 may be made over to proprietor.

57. When a ward dies or ceases to be disqualified before the debts and liabilities binding on his estate have been discharged, the Court may, with the previous sanction of the Local Government, retain the property under its superintendence until the debts and liabilities are discharged or for any shorter period, and when for the purpose of discharging such debts and liabilities the Court has raised money on condition that it should retain the superintendence of the property until the money so raised is repaid, the Court shall not without the consent of the lender or his representatives withdraw from superintendence until the money so raised has been repaid.

Option to retain superintendence in certain cases.

Provided that, after the death of the ward, the Court shall not retain charge on account of any debt or liability which has been declared by a civil court not to be binding on the representatives of the deceased ward.

58. If the Court retains the superintendence under the provisions of the last preceding section, the person who has succeeded to the property, or the person who has ceased to be disqualified shall in so far as the property in question is concerned be deemed to be a ward of the Court for the purposes of clauses (a) and (b) of section 34.

Disabilities of proprietor in such cases.

Appointment
of guardian
before
release.

59. (1) When the Court decides to release from its superintendence the person and property of a minor it may, before such release, by an order in writing, appoint any person to be the guardian of the person or property or both of such minor.

(2) Such appointment shall take effect from the date of such release.

(3) In appointing a guardian under this section, the Court shall be guided by the provisions of section 17 of the Guardians and Wards Act, 1890.

(4) Every such guardian shall have and be subject to the same rights, duties and liabilities as if he had been appointed under the Guardians and Wards Act, 1890.

Recovery of
expenses after
release.

60. Any expense incurred by the Court on account of any property under its charge, and not defrayed from such property during the Court's superintendence may, after the release of such property, be recovered as if it were an arrear of land revenue from any person into whose possession such property or any part thereof may have passed.

Provided that the sum so recovered from any such person shall not be greater than the value of any such property, which so passed into the possession of such person.

Procedure
when succe-
sion to ward's
property is
disputed.

61. Whenever, on the death of any ward, the succession to his property or any part thereof is disputed, the Court may either direct that such property, or part thereof, be made over to any person claiming the property, or may retain the superintendence of the property until a claimant has established his title to the same in a competent civil court, or institute a suit of interpleader against all the claimants.

Notification
of release
from superin-
tendence.

62. Whenever the Court releases any person or property from its superintendence, the fact of such release shall be notified in the *Port St. George Gazette* and also in the Gazette of the district in which such property or any part thereof is situate.

CHAPTER VIII.

MISCELLANEOUS.

Powers of
Court in

63. If a ward is the hereditary trustee or manager of a temple, mosque or other religious establishment or endowment, the